MILITARY ADMINISTRATIVE DISCHARGES—THE PENDULUM SWINGS

ROBINSON O. EVERETT*

The type of discharge which a man receives upon being separated from the Armed Services can have a profound effect on his civilian life. Not unexpectedly, therefore, much concern has been recently expressed concerning the safeguards and procedures available to the serviceman to contest an unfavorable discharge, both before and after termination of his military service. This article exhaustively examines the problems surrounding the administrative discharge and the limitations being imposed on its unfair use by the military itself, by the courts, and by Congress.

INTRODUCTION

IN 1962 the Subcommittee on Constitutional Rights of the Senate Judiciary Committee opened legislative hearings on the constitutional rights of military personnel by emphasizing concern that administrative discharges were being increasingly used by the Armed Services to circumvent safeguards for the serviceman which Congress had provided in the Uniform Code of Military Justice.[1] Those hearings resulted in a number of legislative recommendations[2] and the introduction by Senator Sam J. Ervin, Jr. of several bills to provide service personnel with new protection in military administrative actions and to reverse the trend towards their use.[3] None of these bills was the subject of hearings during the Eighty-Eighth Congress; but they were all reintroduced in the present

* A.B. 1947, LL.B. 1950, Harvard University. Adjunct Professor of Law, Duke University. Consultant and former Counsel, Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary. Author, MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES (1956).

[1] See *Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 87th Cong., 2d Sess. (1962) [hereinafter cited as *1962 Hearings*]. The Uniform Code of Military Justice was enacted on May 5, 1950, 64 Stat. 108, and is now codified in 10 U.S.C. §§ 801-940 (1964).

[2] See SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 88TH CONG., 1ST SESS., SUMMARY—REPORT OF HEARINGS ON CONSTITUTIONAL RIGHTS OF MILITARY PERSONNEL (Comm. Print 1963) [hereinafter cited as 1963 SUMMARY—REPORT].

[3] On August 6, 1963, Senator Ervin and several co-sponsors introduced eighteen bills, S. 2002 to S. 2019, 88th Cong., 1st Sess. (1963), pertaining to military justice and administrative discharges. 109 CONG. REC. 14139 (1963).

Congress.[4] During January of 1966, Senate hearings took place under Senator Ervin's chairmanship to determine what need currently exists for enactment of these measures.[5]

Like Congress, the courts also have been concerned with possible abuses of the administrative discharge—especially when such a discharge is predicated upon alleged misconduct which could be made the subject of a trial by court-martial, in which the protections of the Uniform Code would be applicable.[6] Recent decisions inveighing against such matters as command influence on administrative boards,[7] failures to provide opportunities for confrontation and cross-examination,[8] and deviations by military authorities from their own regulations[9] make it probable that administrative action will be used less frequently by the Armed Services in the future in separating undesirables. Indeed, a recent decision by the Court of Appeals for the First Circuit reveals a willingness to extend the scope of judicial relief even to punitive discharges pursuant to court-martial sentence.[10]

Meanwhile—probably in substantial part because of congressional and judicial scrutiny[11]—the Armed Services have been revising their procedures for administrative discharges. Legally-trained military counsel are now being made more readily available to the respondent

[4] S. 745 to S. 762, 89th Cong., 1st Sess. (1965). See 111 CONG. REC. 1227-45 (daily ed. Jan. 26, 1965).

[5] The hearings were scheduled as joint hearings of the Senate Subcommittee on Constitutional Rights and of a special three-member subcommittee of the Senate Armed Services Committee—the latter subcommittee being composed of Senators Ervin, Cannon, and Thurmond. Senator Ervin is the chairman of each subcommittee—a circumstance which greatly facilitated the holding of the joint hearings. Originally, six days of hearings were scheduled for January 1966, but only four days could be completed. Three more days of hearings took place in March 1966.

[6] These protections include rights to assistance of counsel, confrontation and cross-examination, opportunity to obtain witnesses, and protection against double jeopardy. See Dougherty & Lynch, *The Administrative Discharge: Military Justice?*, 33 GEO. WASH. L. REV. 498, 499 n.7 (1964).

[7] See Cole v. United States, Civil No. 112-63, Ct. Cl., June 11, 1965.

[8] See Gamage v. Zuckert, Civil No. 1124-64, D.D.C., Sept. 30, 1965 (Holtzoff, J.).

[9] See, *e.g.*, Roberts v. Vance, 343 F.2d 236 (D.C. Cir. 1964); Murray v. United States, 154 Ct. Cl. 185 (1961); Clackum v. United States, 148 Ct. Cl. 404, 296 F.2d 226 (1960).

[10] Ashe v. McNamara, 335 F.2d 277 (1st Cir. 1965).

[11] At the January 1966 hearings on the Ervin bills, Mr. John J. Finn, who appeared in behalf of the American Legion, expressed his opinion that the Department of Defense had promulgated a new directive concerning administrative discharges on December 20, 1965, see note 14 *infra* and accompanying text, because of the imminence of the hearings. Mr. Herbert Marks, an attorney who appeared at the hearings, indicated that pre-trial briefings of certain Air Force boards had been abandoned only after questions as to their legality had been raised by the opinion of the Court of Claims in Cole v. United States, Civil No. 112-63, Ct. Cl., June 11, 1965.

serviceman in administrative proceedings; administrative "double jeopardy" is being curtailed;[12] and probation has been authorized for administrative discharges.[13] Indeed, on the eve of the January 1966 Senate hearings, the Department of Defense issued a new directive, providing extensive new protections for the serviceman.[14]

This three-pronged movement to change the rules governing administrative discharges becomes all the more significant at a time when rapid expansion of military manpower is taking place and when many more Americans are becoming subject to military discharge action. Furthermore, with active hostilities in progress, it becomes imperative to achieve a proper reconciliation of the needs of military discipline with the requirements of justice to the individual serviceman. In addition, the permissible scope of use for the administrative discharge may have some effect on military personnel policies; there will be greater willingness to induct or enlist men falling in certain "borderline" categories if they can be readily eliminated in the event they prove unsatisfactory or undesirable.

A. *The Kinds of Discharge*

Five kinds of discharge are currently in use: 1) honorable; 2) general—which, while under honorable conditions, is different from an honorable discharge; 3) undesirable; 4) bad conduct; and 5) dishonorable. The honorable discharge and the general discharge are identical with respect to entitling their holders to benefits ad-

[12] See 1963 SUMMARY—REPORT 6, which refers to a curtailment by the Air Force of administrative "double jeopardy" soon after the 1962 Senate hearings. An amendment dated Jan. 18, 1966, adding paragraph V. (A.) 8. to the most recent Department of Defense directive, see note 14 *infra* and accompanying text, also provides safeguards against the former practice of referring an administrative discharge case to a second discharge board if the reviewing authority considered the board's findings and recommendations to be unduly favorable to the respondent serviceman.

[13] The report on the 1962 hearings commented: "The execution of a punitive discharge imposed by a court-martial can be suspended. However, so far as the subcommittee has been informed, there is no formal procedure for suspending an administrative discharge or putting a serviceman on probation before the issuance of the discharge. (Subsequent to the hearings the subcommittee was informally advised that the Navy has developed a practice resembling probation for a sailor who has been recommended for an administrative discharge.)" 1963 SUMMARY—REPORT 13. The Air Force also subsequently authorized a Probation and Rehabilitation Program for Airmen Subject to Administrative Discharge for Cause. Air Force Reg. 39-3, Aug. 18, 1964. Department of Defense Directive 1332.14, para. X., Dec. 20, 1965 authorizes the suspension of execution of an approved administrative discharge.

[14] *Administrative Discharges,* Department of Defense Directive No. 1332.14, Dec. 20, 1965 [hereinafter cited as 1965 Dep't of Defense Directive]. The directive took effect in March 1966.

ministered either by a military department or by the Veterans Administration.[15] However, the general discharge seems often to be viewed—by prospective civilian employers and others—as carrying an implied stigma; the public reasons that, since the overwhelming percentage of discharges are honorable, there must be some defect in a man who has only received a general discharge.[16]

Honorable, general, and undesirable discharges can only result from administrative action and cannot be included as part of a court-martial sentence. Bad conduct and dishonorable discharges are punitive and can only be imposed by a court-martial—bad conduct discharges by either special or general court-martial, and dishonorable discharges only by general court-martial.[17] Officer's dismissal —which can only be imposed by general court-martial[18]—corresponds in effect and in stigma to the dishonorable discharge for enlisted personnel. While an officer cannot be sentenced to a bad conduct discharge,[19] he is subject to administrative separation as undesirable.

The bad conduct discharge, which is punitive, and the undesirable discharge, which is administrative, are quite similar in their effects on benefits;[20] and one can only speculate as to which

[15] See *1962 Hearings* 15-18, 354-64.

[16] See 1963 SUMMARY—REPORT 5; *1962 Hearings* 328, 330-41. Air Force Reg. 39-10, March 17, 1959, comments in paragraph 8a: "However, a general discharge has been found to be a definite disadvantage to an airman seeking civilian employment." See also Murray v. United States, 154 Ct. Cl. 185 (1961).

[17] See Uniform Code of Military Justice arts. 18-19, 10 U.S.C. §§ 818, 819 (1964). A bad-conduct discharge cannot be imposed by a special court-martial unless a complete record is made of the proceedings and testimony. Since the Army does not authorize the use of court reporters for special courts-martial, a verbatim record cannot be prepared, and, as a consequence, a special court-martial convened in the Army cannot issue a bad conduct discharge.

Under 38 U.S.C. § 3103 (1964), a discharge by reason of a general court-martial sentence—whether that discharge be dishonorable or for bad conduct—will bar all rights to veterans benefits based on the period of service which has been terminated by the punitive discharge. On the other hand, a bad conduct discharge imposed by a special court-martial does not necessarily bar these veterans benefits.

[18] An officer dismissed by order of the President may make a demand for trial by general court-martial; and, in the event of failure to convene such a court-martial within six months, an administrative discharge must be substituted for the dismissal. Uniform Code of Military Justice art. 4(b), 10 U.S.C. § 804(b) (1964).

[19] See MANUAL FOR COURTS-MARTIAL—UNITED STATES ¶ 126d (1951) [hereinafter cited as MANUAL FOR COURTS-MARTIAL]. A warrant officer may be sentenced by a general court-martial to a dishonorable discharge but not to a bad conduct discharge. *Ibid.* Since a special court-martial does not have authority to adjudge a dismissal or a dishonorable discharge and lacks some of the safeguards available in general courts-martial, it is unusual to try an officer or warrant officer by special court-martial—even though such a trial would apparently not violate any statutory restriction.

[20] See *1962 Hearings* 15-18, 354-64; Dougherty & Lynch, *supra* note 6, at 499-500.

carries the greater stigma.[21] However, the bad conduct discharge is subject to extensive procedures for review prescribed by the Uniform Code of Military Justice—including an opportunity to petition for review by the Court of Military Appeals[22]—while the undesirable discharge is not subject to a clearly-defined statutory procedure for review.

B. *Misconduct As a Basis for Discharge Action*

The situation regarding discharges is confused by the fact that misconduct which could be punished by a punitive discharge—a dishonorable or bad conduct discharge for an enlisted man or dismissal for an officer—may, instead of being imposed by court-martial. be made the basis for an administrative discharge, perhaps discharge under other than honorable conditions. And even an administrative discharge, especially if undesirable, carries consequences for the recipient which may be far more serious than those ordinarily connected with a mere termination of employment.

The overlap can be illustrated in terms of the discussion of "unfitness" which appears in the most recent Department of Defense Directive concerning "Administrative Discharges," which was issued on December 20, 1965 to take effect ninety days later:

> *Unfitness.* Discharge by reason of unfitness, with an Undesirable Discharge, unless the particular circumstances in a given case warrant a General or Honorable Discharge, when an individual's military record in his current enlistment or period of obligated service includes one or more of the following:
>
> 1. Frequent involvement of a discreditable nature with civil or military authorities.

However, if the bad conduct discharge has been imposed by a general court-martial, veterans benefits are automatically barred by statute. 38 U.S.C. § 3103 (1964).

[21] Chief Judge Quinn of the Court of Military Appeals testified concerning the undesirable discharge: "I think . . . it is worse than a bad conduct discharge, as far as its implications are concerned, and the results also are quite severe." *1962 Hearings* 188. As the late Congressman Doyle described the stigma of the undesirable discharge: "He is an undesirable. You don't want to have anything to do with him. You don't go into detail to find out what makes him undesirable. You think he may be a thief, he may be a homosexual, he may not be supporting his children, his family in the minds of some people, but he is undesirable, you don't want him around. And I think the ordinary patriotic, sound thinking American citizen doesn't want to have anything to do with an undesirable man and that applies to an undesirable man from the military, something has occurred there in the military for which he has gotten an undesirable discharge; it is a stigma. It is a liability and a heavy one." *Id.* at 328. For other views see *id.* at 257-58.

[22] Uniform Code of Military Justice arts. 66-67, 10 U.S.C. §§ 866-67 (1964).

2. Sexual perversion including but not limited to (1) lewd and lascivious acts, (2) homosexual acts, (3) sodomy, (4) indecent exposure, (5) indecent acts with or assault upon a child, or (6) other indecent acts or offenses.
3. Drug addiction, habituation, or the unauthorized use or possession of narcotics, hypnotics, sedatives, tranquilizers, stimulants, hallucinogens, and other similar known harmful or habit forming drugs and/or chemicals.
4. An established pattern for shirking.
5. An established pattern showing dishonorable failure to pay just debts.
6. An established pattern showing dishonorable failure to contribute adequate support to dependents or failure to comply with orders, decrees, or judgments of a civil court concerning support of dependents.
7. Unsanitary habits.[23]

In light of the fact that article 134 of the Uniform Code proscribes "all conduct of a nature to bring discredit upon the armed forces,"[24] the directive's first category of unfitness—"frequent involvement of a discreditable nature with civil or military authorities"—would usually, if not inevitably, import the commission of a series of violations of the Uniform Code. Moreover, under the *Manual for Courts-Martial,* which is itself an executive order promulgated by the President,[25] the repeated violations, even though minor, could result in a bad conduct (or dishonorable) discharge,[26] if they were

[23] 1965 Dep't of Defense Directive para. VII. (I.).

[24] 10 U.S.C. § 934 (1964).

[25] Exec. Order No. 10214, 16 Fed. Reg. 1303 (1951). See also Uniform Code of Military Justice art. 36, 10 U.S.C. § 836 (1964). The President, of course, may issue further executive orders to modify the maximum punishments prescribed in the *Manual for Courts-Martial.* See, *e.g.,* Exec. Order No. 10247, 16 Fed. Reg. 5035 (1951), suspending limitations upon punishments for violations of certain articles of the Uniform Code of Military Justice; Exec. Order No. 10628, 20 Fed. Reg. 5741 (1955), restoring these limitations upon punishments; Exec. Order No. 10652, 21 Fed. Reg. 235 (1956), amending the *Manual for Courts-Martial* as to automatic reduction included in certain sentences; Exec. Order No. 10565, 19 Fed. Reg. 6299 (1954), amending the maximum permissible punishments for certain offenses.

[26] MANUAL FOR COURTS-MARTIAL ¶ 127c contains as § A a Table of Maximum Punishments authorized for various offenses. Section B authorizes: *"Permissible Additional Punishments.*—If an accused is found guilty of an offense or offenses for none of which dishonorable or bad conduct discharge is authorized, proof of two or more previous convictions will authorize bad conduct discharge and forfeiture of all pay and allowances and, if the confinement otherwise authorized is less than three months, confinement at hard labor for three months." *Id.* ¶ 127c, at 228. Exec. Order 10565, 19 Fed. Reg. 6299 (1954), added the following provision to § B of ¶ 127c: "If an accused is found guilty of an offense or offenses for none of which dishonorable discharge is authorized, proof of three or more previous convictions during the

proved before a court-martial. But, again, in a court-martial proceeding the accused would receive a number of protections unavailable to him as respondent in an administrative proceeding which might result in his undesirable discharge for unfitness.

The second category of unfitness—"sexual perversion"—would generally involve acts which constituted very serious violations of the Uniform Code, authorizing both discharge and extensive confinement if tried by court-martial.[27] As to the third category of unfitness, "drug addiction" would presumably be a sickness that could not in itself be made the subject of court-martial;[28] and one might also question whether such a sickness can constitutionally be made the basis of an undesirable discharge—which is not medical and hence carries considerable stigma.[29] However, unauthorized use or possession of narcotics and the like, as covered in this third category, would generally be a violation of article 134 of the Uniform Code and would authorize a punitive discharge if the possessor or user were tried therefor by a court-martial.[30]

An "established pattern for shirking"—the subject of the fourth category of unfitness—would often involve derelictions in duty and failures to obey, which are violations of article 92 of the Uniform Code and thus are subject to trial by court-martial.[31] With respect

year next preceding the commission of any offense of which the accused stands convicted will authorize dishonorable discharge and forfeiture of all pay and allowances and, if the confinement otherwise authorized is less than one year, confinement at hard labor for one year." The existence of these habitual offender provisions makes it difficult to contend that an administrative discharge is the only way to get rid of the serviceman who commits a series of minor violations. If these violations are reflected in convictions by summary or special court-martial, the serviceman can ultimately be subjected to a punitive discharge and substantial confinement as well.

[27] An act of sodomy, which is punishable under 10 U.S.C. § 925 (1964), authorizes a dishonorable discharge, total forfeiture of pay and allowances, and confinement at hard labor for not more than five years. MANUAL FOR COURTS-MARTIAL ¶ 127c, at 223. An indecent act or assault—punishable under 10 U.S.C. § 934 (1964) as service-discrediting conduct—will authorize equally severe punishment. MANUAL FOR COURTS-MARTIAL ¶ 127c, at 224-26

[28] *Cf.* Robinson v. California, 370 U.S. 660 (1962).

[29] Under the new Department of Defense Directive a general discharge may be issued by reason of unsuitability resulting from "alcoholism." 1965 Dep't of Defense Directive para. VII. (G.)5. To the extent that a general discharge carries a stigma, the argument might be made that the recipient is being "punished" for his sickness. Compare the recent ruling by the Court of Appeals for the Fourth Circuit in Driver v. Hinnant, 34 U.S.L. WEEK 1121 (4th Cir. Jan. 21, 1966).

[30] See MANUAL FOR COURTS-MARTIAL ¶ 213a. The Table of Maximum Punishments authorizes a dishonorable discharge and up to five years confinement for wrongful possession or use of habit-forming drugs or marihuana. *Id.* ¶ 127c, at 225.

[31] Under the Table of Maximum Punishments the punishments authorized for violations of Uniform Code of Military Justice art. 92, 10 U.S.C. § 892 (1964), are

to the fifth category—a pattern of "dishonorable failure to pay just debts"—the *Manual for Courts-Martial* reveals that punishment in the form of a dishonorable discharge and up to six months confinement could be imposed by a court-martial for even a single failure to pay a just debt.[32]

The sixth category of unfitness is dishonorable failure to support dependents, and it is not improbable that such conduct would be "service-discrediting" within the meaning of article 134 of the Uniform Code and, therefore, would be punishable by court-martial.[33] Conceivably "unsanitary habits," which constitute the seventh category of unfitness, would be violations of article 134 in themselves;[34] they might constitute dereliction in the performance of duties.[35] In any event, continuance of these habits in the face of a lawful order to the contrary could be made the basis of punishment by court-martial.[36]

In short, those acts which in the eyes of the Armed Services demonstrate a serviceman's unfitness, and thus can be made the basis of an administrative proceeding to separate an "undesirable," could generally be prosecuted before a court-martial. And in most instances such acts would authorize the court-martial to impose not only a sentence of confinement and the forfeiture of pay and allowances, but also a punitive discharge. However, the procedures involved—and the protections for the serviceman—will differ mark-

these: (a) dishonorable discharge and up to two years confinement for failure to obey any lawful general order or regulation; (b) bad conduct discharge and up to six months confinement for failure to obey any other lawful order; and (c) three months confinement for being derelict in the performance of duties and forfeiture of ⅔ pay per month not to exceed three months. MANUAL FOR COURTS-MARTIAL ¶ 127c, at 221. Of course, where there has been an "established pattern," the possibility would exist of utilizing the permissible additional punishments authorized under MANUAL FOR COURTS-MARTIAL ¶ 127c, § B. See note 26 *supra*.

[32] MANUAL FOR COURTS-MARTIAL ¶ 127c, at 225. See United States v. Kirksey, 6 U.S.C.M.A. 556, 20 C.M.R. 272 (1955); United States v. Downard, 6 U.S.C.M.A. 538, 20 C.M.R. 254 (1955).

[33] Failure to pay an indebtedness may be service-discrediting according to Uniform Code of Military Justice art. 134, 10 U.S.C. § 934 (1964). The dishonorable failure to pay support to dependents would certainly seem to so qualify.

[34] These habits might be considered to involve either (a) disorders and neglects to the prejudice of good order and discipline in the Armed Forces or (b) conduct of a nature to bring discredit upon the Armed Forces. For a discussion of these concepts, as interpreted by the Court of Military Appeals, see Everett, *Article 134, Uniform Code of Military Justice—A Study in Vagueness*, 37 N.C.L. REV. 142 (1959).

[35] See Uniform Code of Military Justice art. 92, 10 U.S.C. § 892 (1964); MANUAL FOR COURTS-MARTIAL ¶ 171c.

[36] See Uniform Code of Military Justice arts. 90-92, 10 U.S.C. §§ 890-92 (1964).

edly depending on the choice made by military authorities between court-martial action and administrative discharge.

This choice may, in turn, be influenced by a desire to bypass the very protections which are available to the accused before courts-martial. Thus, the Court of Military Appeals commented in its annual report for 1960:

> The unusual increase in the use of the administrative discharge since the code became a fixture has led to the suspicion that the services were resorting to that means of circumventing the requirements of the code. The validity of that suspicion was confirmed by Maj. Gen. Reginald C. Harmon, then Judge Advocate General of the Air Force, at the annual meeting of the Judge Advocates Association held at Los Angeles, Calif., August 26, 1958. He there declared that the tremendous increase in undesirable discharges by administrative proceedings was the result of efforts of military commanders to avoid the requirements of the Uniform Code. Although he acknowledged that men thereby affected were deprived of the protections afforded by the code, no action to curtail the practice was initiated.[37]

In a similar vein, the Armed Services have contended that they should be free to eliminate a serviceman as unfit with an undesirable discharge for alleged misconduct that clearly could not be established beyond reasonable doubt before a court-martial, since the latter is subject to the rules of evidence, corpus delicti requirements, and the like.[38] They have thus opposed Senator Ervin's proposed legislation to grant to a serviceman who is the respondent in administrative discharge proceedings for misconduct the election to require trial by court-martial.[39]

C. *Ramifications of Administrative versus Court-Martial Action*

In the law many serious consequences hinge on the distinction between "punitive" and "administrative" action.[40] For some pur-

[37] Quoted in *1962 Hearings* 2.

[38] See 1963 SUMMARY—REPORT 9; *1962 Hearings* 139. Brigadier General Kenneth J. Hodson, Assistant Judge Advocate General of the Army, testified to this general effect during the January 1966 Senate hearings. McCurdy v. Zuckert, Civil No. 65-132, M.D. Fla., Nov. 4, 1965, now on appeal to the Court of Appeals for the Fifth Circuit, seems to present this very problem.

[39] S. 758, 89th Cong., 1st Sess. (1965). This bill was opposed by Defense spokesmen at the January 1966 hearings. Compare Uniform Code of Military Justice art. 4, 10 U.S.C. § 804 (1964).

[40] There are many instances when a conviction can give rise to serious collateral consequences for the defendant, and no objection of former jeopardy will be available

poses it might be very unfortunate to establish the principle that every discharge under other than honorable conditions is "punitive." For example, if such a principle were established, a serious question would exist of the right to separate administratively as undesirable a serviceman who had been convicted of a serious crime by a federal district court.[41] On the other hand, the undesirable discharge differs from other administrative action in that a major purpose of the Armed Services in using such a discharge seems to be the creation of a stigma for its recipient; absent such stigma there would be little point in utilizing this label in discharge action. In terms of its effects on reputation, the stigma experienced by the recipient of a discharge under other than honorable conditions is very akin to the concept of infamy—a concept which has some legal significance.[42]

Many jurisdictions differentiate felony from misdemeanor in terms of whether the permissible punishment for the offense includes penitentiary confinement;[43] presumably this differentiation reflects a belief that being confined in a penitentiary is especially degrading, irrespective of the length of such confinement. Confinement at hard labor often is differentiated in consequences from mere confinement[44]—again presumably by virtue of an assumption

to him. For example, in Jordan v. DeGeorge, 341 U.S. 223 (1951), deportation was based on conviction of certain offenses involving moral turpitude. An attorney may be disbarred for conviction of a crime demonstrating unfitness to practice law. 7 AM. JUR. 2D, *Attorneys at Law* § 50 (1963). In most jurisdictions there are procedures for revoking or suspending a driver's license by reason of convictions under the motor vehicle laws. *E.g.*, N.C. GEN. STAT. § 20-16 (Supp. 1965). Moreover, civil sanctions and forfeitures can be imposed for certain violations of law without regard to the outcome of criminal proceedings which arise from the same facts. Rex Trailer Co. v. United States, 350 U.S. 148 (1956); United States *ex rel.* Marcus v. Hess, 317 U.S. 537 (1943); Helvering v. Mitchell, 303 U.S. 391 (1938); Various Items v. United States, 282 U.S. 577 (1931); *cf.* Yates v. United States, 355 U.S. 66 (1957) (distinguishing between criminal and civil contempt).

[41] In light of Grafton v. United States, 206 U.S. 333 (1907), the defense of double jeopardy would then be available to a serviceman who was being punished for the second time.

[42] Under the fifth amendment a grand jury presentment or indictment is required for prosecution of an "infamous crime." United States v. Moreland, 258 U.S. 433 (1922), held that an offense is "infamous" if conviction thereof authorizes imposition of an infamous punishment, and that imprisonment in a workhouse at hard labor constitutes an "infamous" punishment. At common law, "infamous" crimes were those which disqualified convicts as witnesses; and it was the nature of the offense, not the punishment, that rendered it infamous. See CLARK & MARSHALL, LAW OF CRIMES 100-01 (Wingersky rev. 1958).

[43] *Id.* at 97-99.

[44] See United States v. Moreland, 258 U.S. 433, 441 (1922). However, under the Uniform Code of Military Justice art. 58 (b), 10 U.S.C. § 858 (b) (1964), a court-martial cannot sentence an offender to confinement without hard labor.

that the hard labor carries with it a special stigma and opprobrium. Against this backdrop, it seems somewhat incongruous to allow the Armed Services to stigmatize a serviceman for alleged misconduct without providing him with a number of procedural safeguards. The incongruity is heightened by the circumstance that although the Congress—entrusted under the Constitution with the power to "make Rules for the Government and Regulation of the land and naval Forces"[45]—has provided for the imposition of bad conduct discharges and dishonorable discharges, no similar provision—indeed, no express provision whatsoever—has been made for the use of undesirable discharges or for the safeguards which shall accompany their use.[46]

---

[45] U.S. CONST. art. I, § 8.

[46] In Grant v. United States, 162 Ct. Cl. 600 (1963), a former Navy enlisted man, who had been discharged with a general discharge, contested its validity on the ground that, since the discharge was by reason of oral sodomy with a female prostitute, he should have been proceeded against criminally, rather than administratively. The Court of Claims reasoned, however, that prosecution for sodomy under Uniform Code of Military Justice art. 125, 10 U.S.C. § 925 (1964), was not the sole means for proceeding against a serviceman, that denial of a court-martial for him was not unconstitutional, and that naval authorities could discharge him administratively. Grant v. United States, *supra* at 608. The court commented: "He was not charged criminally and consequently the safeguards of the Fifth and Sixth Amendments to the Constitution do not come into the picture." *Ibid.* "Only a court-martial can impose a punitive discharge and these discharges, i.e., bad conduct and dishonorable, are imposed for punishment. The type of discharge plaintiff received was an administrative discharge with no incumbent penalties." *Id.* at 609. In Rowe v. United States, 167 Ct. Cl. 468 (1964), *cert. denied,* 380 U.S. 961 (1965), the plaintiff was seeking back pay by reason of his undesirable discharge. Rowe contended that the enactment of the Uniform Code, which authorizes courts-martial to adjudge dishonorable and bad conduct discharges, had preempted the field and had by implication prohibited the military services from administratively issuing any sort of derogatory discharge that might diminish the benefits otherwise available to discharged persons. Answering this contention, the court pointed out that § 6 of the Act of May 5, 1950, 64 Stat. 145—the same act which in § 1 enacted the Uniform Code of Military Justice—had provided that former Article of War 108, as amended, 41 Stat. 809 (1920), should continue to have the same force, effect, and applicability as before, although it would no longer be known as an "Article of War." This article, which thereby was retained in effect, provided that no enlisted person should be discharged before the expiration of his term of service except by the President, or by order of the secretary of the military department, or pursuant to a court-martial sentence. The court pointed out that under this article, which emanates from Article of War 11 in the Act of April 10, 1806, 2 Stat. 361, it had been held that the executive branch of the Government possessed the authority to determine the form and terms of discharge certificates to be issued administratively. See, *e.g.,* Davis v. Woodring, 111 F.2d 523, 525 (D.C. Cir. 1940). The court then commented that it was ". . . sufficient if the form and terms of a discharge certificate adequately indicated the nature of the service performed . . . . Furthermore, this executive authority had been held to extend to the issuance administratively of discharges without honor. . . . Congress showed a clear intention, in section 6 of the same statute which enacted the Uniform Code of Military Justice, that the executive authority respecting military discharges should con-

Various methods have been proposed for reducing the divergence between punitive and administrative discharge action. Perhaps the simplest method would be to preclude the issuance of an administrative discharge carrying any stigma for its recipient[47] and to require that the only separations from service predicated on misconduct be by punitive discharge resulting from sentence by court-martial. However, this drastic reversal of the trend towards greater use of administrative discharge, the trend which the Court of Military Appeals criticized in 1960,[48] might create substantial problems. For one thing, would such a limitation on administrative discharges make it impossible for the Armed Services to eliminate unfit and unsuitable personnel readily enough to maintain military efficiency? Also, commanders might decide that, in light of the limitations on administrative discharges for misconduct and the difficulties and annoyances of trying personnel by court-martial for violations of the Uniform Code, it would be easiest to discharge unfit servicemen with honorable discharges for the convenience of the Government. In that event, the honorable discharge would be debased, and a sort of misrepresentation would take place concerning the quality of the service rendered by its recipient.

Another method proposed to limit the possibilities for abuse in the issuance of administrative discharges would involve eliminating from the discharge any characterization of the service rendered by the recipient. Under such a proposal, there would be no honorable, general, or undesirable discharge—only an administrative discharge. This discharge document would not indicate expressly what sort of service had been rendered, although it might refer to the regulation or directive under which the discharge had been issued.

In some instances, that reference in the discharge in itself might provide ample basis for inferring why the discharge had been issued—for example, if the directive were one entitled "Discharges for Sexual Perversion," "Discharges for Security," or the like. However, the chief difficulty is that, by reason of the fact that millions of American veterans have received honorable discharges in the past,

tinue and should not be affected by the enactment of the Code." Rowe v. United States, *supra* at 472.

[47] Under this approach a question might arise as to whether the stigma created by a general discharge would be sufficient to preclude its issuance—even though the general discharge is under honorable conditions and does not affect adversely the benefits administered either by the Armed Services or the Veterans Administration.

[48] See text accompanying note 37 *supra*.

a serviceman on duty today expects to be rewarded with an honorable discharge if he renders meritorious service; interfering with that expectation seems an unsatisfactory solution,[49] and would require considerable reeducation of the general public.

If, however, the administrative discharge for misconduct is to continue its coexistence with the punitive discharge, what are, and what should be, the safeguards for its use? First, this article will examine new safeguards which have been forthcoming—perhaps somewhat involuntarily—from the Armed Services themselves; then those which have been expressed in judicial decisions; and finally those proposed in the Ervin bills which are now pending before the Senate.

I

SAFEGUARDS PROVIDED BY THE ARMED SERVICES

A. *Safeguards Prior to Discharge*

At one time only primitive safeguards existed for the serviceman before he was issued an undesirable discharge.[50] Gradually, however, the Armed Services have expanded the respondent's opportunity for a hearing of his contentions and have made legal counsel more readily available to aid him. In cases where a board of officers had recommended against issuance of an undesirable discharge or even favored retention of the respondent, efforts by commanding officers to circumvent or ignore the board's recommendation have diminished. This trend towards expansion of the protections furnished the serviceman by the Armed Services has culminated in the Department of Defense Directive of December 20, 1965.[51]

Under the provisions of this directive, administrative discharges for unsuitability—which may be either honorable or general discharges—will not normally be issued for a) inaptitude; b) apathy, defective attitudes, and inability to expend effort constructively; c) alcoholism; or d) financial irresponsibility, until the prospective recipient "has been counseled concerning his deficiencies and afforded a reasonable opportunity to overcome them."[52] However, the requirement of counseling would not apply to discharges for un-

[49] Some veterans benefits under state laws have hinged on the receipt of an honorable, rather than a general, discharge. See, *e.g.*, Ohio Laws 1955-1956, at 830-31 (1955).

[50] See, *e.g.*, Clackum v. United States, 148 Ct. Cl. 404, 296 F.2d 226 (1960), where the procedures used by Air Force authorities are reviewed and severely criticized.

[51] 1965 Dep't of Defense Directive paras. VII.(G.)1., 3., 5., 7.

[52] *Id.* para. V.(A.)1.

suitability by reason of character and behavior disorders, enuresis, homosexual or other aberrant tendencies.[53]

Similarly, the requirement for counseling and reasonable opportunity to overcome deficiencies would govern discharges for unfitness[54]—usually undesirable discharges—if based on a) frequent involvement of a discreditable nature with civil or military authorities; b) an established pattern for shirking; c) an established pattern showing dishonorable failure to pay just debts; or d) an established pattern showing dishonorable failure to contribute adequate support to dependents.[55] However, discharges for unfitness by reason of sexual perversion, drug addiction, or unsanitary habits would not fall under this requirement.[56]

By insisting on counseling to try to correct deficiencies, the Armed Services have indicated their awareness of the suggestions voiced during the 1962 Senate hearings that many administrative discharges could be avoided by corrective action at the outset.[57] Absent this corrective action and the opportunity to reform, the serviceman may return to civilian society with a type of discharge that creates a stigma for him, limits his potential as a civilian, and makes him a continuing problem for civil authorities; and the services must write off their investment of time and money in training him. The provision for counseling prior to administrative discharge action is paralleled by the authorization to suspend the execution of an approved discharge, so that a serviceman can be retained on duty under probation after he has been initially recommended for issuance of an administrative discharge.[58]

The directive provides that no "member" of the Armed Forces —*i.e.*, no enlisted man or woman[59]—is to be discharged under conditions other than honorable unless he is afforded the right to present

[53] *Id.* paras. V.(A.)1., VII.(G.). Presumably it was believed that counselling would be of little benefit in remedying these deficiencies.

[54] *Id.* para. V.(A.)1.

[55] *Id.* paras. V.(A.)1., VII.(I.)1., 4., 5., 6.

[56] *Id.* paras. VII.(I.)2., 3., 7.

[57] See 1963 SUMMARY—REPORT 5.

[58] 1965 Dep't of Defense Directive para. X. The Armed Services have devised effective probation and rehabilitation procedures in connection with punitive discharges. The Air Force's 3320th Retraining Group at Amarillo Air Force Base, Texas, has been especially noteworthy in this regard. See *1962 Hearings* 167-68, 943-44.

[59] See definition of "member" in Dep't of Defense Directive para. IV.(A.). The policies, standards and procedures prescribed by this directive apply only to the administrative discharge of enlisted persons, *id.* para. I., and thus do not affect directly the separation of officers and warrant officers.

his case before an administrative discharge board with the advice and assistance of counsel,[60] and unless such discharge is supported by appropriate findings of that board and by the board's recommendation for undesirable discharge.[61] Significantly, the respondent's counsel must be a lawyer, as defined by article 27 (b) (1) of the Uniform Code of Military Justice[62] "unless appropriate authority certifies in the permanent record the nonavailability of a lawyer so qualified and sets forth the qualifications of the substituted nonlawyer counsel."[63] At the time of the 1962 Senate hearings there existed no clear practice in the Armed Services of furnishings lawyers to all respondents who were confronted with the prospect of an undesirable discharge.[64] To some extent the right to legally-trained counsel depended on the "reasonable availability" of a lawyer as determined by a commanding officer on the basis of a number of factors.[65] Clearly the new directive is intended to require as a general rule that the respondent serviceman receive the assistance of an attorney.

Interestingly, the Uniform Code of Military Justice allows *special* courts-martial to impose a bad conduct discharge without regard to whether the accused has been furnished with legally-trained counsel.[66] The Court of Military Appeals, overruling the Navy Board of Review, held in 1963 that the Constitution did not require that a serviceman before a court-martial be furnished with a lawyer if he were to be sentenced only to a bad conduct discharge.[67] The effect of this decision, coupled with the new directive, is to produce a swing of the pendulum, so that the serviceman now has a broader right to counsel before an administrative discharge board than before a special court-martial, although the undesirable discharge that the board might impose would have effects roughly the same as those

[60] *Id.* para. V. (A.)2.

[61] *Ibid.*

[62] 10 U.S.C. § 827 (b) (1) (1964). Under this provision the counsel must be a graduate of an accredited law school or a member of the bar of a federal court or the highest court of a state. For the most part, the Armed Services seek to maintain a strict dichotomy between punitive action and administrative action, *i.e.*, between the requirements of the Uniform Code and those governing administrative discharges. Yet in this instance a directive pertaining to administrative action incorporates a definition contained in the Uniform Code.

[63] 1965 Dep't of Defense Directive para. IV. (K.).

[64] See *1962 Hearings* 832-33, 860-61, 899, 903, 918, 930, 952-53.

[65] See 1963 SUMMARY—REPORT 43-44.

[66] 10 U.S.C. §§ 819, 827 (1964).

[67] United States v. Culp, 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963).

of the bad conduct discharge to which the court-martial might sentence an accused—and, in addition, the court-martial could impose confinement and forfeitures.

The anomaly may be only temporary. A district court has recently invalidated a sentence of confinement imposed by a special court-martial before which the accused was represented by counsel who lacked legal training.[68] Moreover, one of Senator Ervin's legislative proposals[69]—in which the Department of Defense has apparently acquiesced[70]—would deprive a special court-martial of the authority to impose a discharge under other than honorable conditions if the accused has not been represented by a qualified attorney.

The Department of Defense Directive of December 20, 1965, prohibits the issuance of any discharge less favorable than the one recommended by the administrative discharge board which has heard the case.[71] However, a board recommendation in favor of retention is not binding; and notwithstanding such a recommendation, "the Discharge Authority may direct separation when warranted by the circumstances of a particular case"—in which event the person separated will receive "an Honorable or General Discharge certificate in accordance with the prescribed standards of the Service concerned."[72] Thus, even though a board considers that the respondent is suitable enough for retention in the service, a commanding officer may later separate him with a general discharge—a discharge that apparently creates some stigma for the recipient.[73]

The power to override the administrative discharge board's recommendation that a serviceman be retained in service negates one possible limitation on the power of military authorities to separate a serviceman whom they do not want on duty. The power

[68] Application of Stapley, 246 F. Supp. 316 (D. Utah 1965). *But cf.* LeBallister v. Warden, 247 F. Supp. 349 (D. Kan. 1965). See also Neal v. United States, 34 U.S. L. WEEK 2394 (Ct. Cl. Jan. 20, 1966).

[69] S. 750, 89th Cong., 1st Sess. (1965).

[70] This conclusion is based upon the statement of Brigadier General Kenneth J. Hodson, who appeared at the January 1966 hearings as a principal Department of Defense witness concerning those of the Ervin bills which pertained to military justice.

[71] 1965 Dep't of Defense Directive para. V.(A.)3. Prior to this directive the Air Force and Army prohibited—while the Coast Guard, Marine Corps and Navy permitted—the issuance of a discharge less favorable than that recommended by an administrative board. See Dougherty & Lynch, *The Administrative Discharge: Military Justice?*, 33 GEO. WASH. L. REV. 498, 515 (1964).

[72] 1965 Dep't of Defense Directive para. V.(A.)4.

[73] See note 16 *supra* and accompanying text.

to discharge for the "convenience of the government,"[74] with an honorable or general discharge, also seems intended to provide commanders with a broad authority to separate unwanted personnel. Such "convenience" includes these reasons: a) general demobilization or reduction in authorized strength; b) "national health, safety or interest"; c) "such other reasons as may be specified and published by the Secretary of the Department concerned"; or d) "notwithstanding the specific provisions of this Directive, the Secretary of a Military Department may direct the separation of any member for the Convenience of the Government prior to the expiration of his term of service, if the Secretary determines that such a separation is in the best interest of that Department."[75]

An inductee would have little basis or occasion to challenge his separation for the convenience of the Government. On the other hand, an enlistee in the regular establishment—who has entered an enlistment contract to serve for a fixed period of time[76]—may feel injured by the termination of his personal service contract for the mere convenience of the other party—*i.e.,* the Government. The services, in turn, would argue that the enlistment contract was always subject to the condition subsequent of termination pursuant to regulations and directives promulgated by appropriate military authorities. And the enlistee might reply that this construction had the effect of making the contract "illusory"—a contention which, however, generally has not been made successfully in the field of government contracts.[77]

---

[74] 1965 Dep't of Defense Directive para. VII. (B.).

[75] *Id.* paras. VII. (B.)1., 3., 10., 11. Some other reasons of "convenience," having an apparently less general applicability, are also stated in paragraph VII. (B.) of the directive.

[76] The enlistment contract has certain unique aspects which differentiate it from other government contracts. See *In re* Grimley, 137 U.S. 147, 151-52 (1890). In Bell v. United States, 366 U.S. 393 (1961), the Government was sued for back pay by certain persons who had been captured by the North Koreans during the Korean War and later declined repatriation. The Government defended on the ground that the plaintiffs had violated their obligation of faithful service to the United States and that, under basic principles of contract law, they were barred from recovery under their enlistment contracts because of their willful breach of that contract. *Id.* at 401. The Supreme Court, however, after discussing the unique nature of an enlistment contract, *id.* at 401-02, concluded that this contract produces a change of status, by reason of which the enlistee is entitled to receive pay so long as he remains a member of the Armed Forces, whether he performs service or not—unless his right to pay is forfeited or lost in a manner prescribed by regulations or otherwise. *Id.* at 402.

[77] Government contracts frequently contain clauses authorizing termination of the contract for the convenience of the Government. If required by procurement regulations, such a clause may be binding on the contractor even if omitted from the

The Armed Services have long followed the practice of discharging administratively—usually with an undesirable discharge—a serviceman who has been convicted of a felony or other serious offense by a federal or state civil court.[78] Continuation of this practice is authorized in the new directive under the heading of "misconduct."[79] However, as was illustrated in one case which ultimately reached the Supreme Court,[80] and as was discussed extensively in the 1962 Senate hearings, the possibility exists that a serviceman who has received an undesirable discharge by reason of a civil court conviction may later appeal that conviction successfully and ultimately be acquitted of the crime. To deal with this contingency, the new directive authorizes processing for discharge notwithstanding the filing of an appeal, but states a general policy of withholding execution of the approved discharge pending outcome of the appeal.[81] Thus, for the most part the serviceman will be able to continue on duty despite his conviction until all his appellate remedies have been exhausted in the civil courts; but it will not be necessary to keep him on duty in the unusual case—for example, when the appeal appears to be frivolous or taken solely for the purposes of delay. However, even in these unusual cases, or in cases where no appeal is taken but later the conviction is set aside by means of collateral attack, the discharged serviceman would seem entitled to a change in the character of his discharge after the charges have been disposed of in his favor.[82]

---

contract. See G. L. Christian & Associates v. United States, 160 Ct. Cl. 1, 320 F.2d 345, *cert. denied*, 375 U.S. 954 (1963).

[78] Conviction in a foreign court for a serious crime may also result in administrative discharge. Because of former jeopardy guarantees a serviceman cannot be tried by court-martial for the same misconduct for which he has already been tried in a federal district court, and vice versa. Grafton v. United States, 206 U.S. 333 (1907). Similar guarantees are contained in the NATO Status of Forces Agreement, June 19, 1951, art. VII, para. 8, [1953] 2 U.S.T. & O.I.A. 1792, T.I.A.S. No. 2846. There is no constitutional limitation on trial by court-martial for a crime for which the serviceman has already been tried in a state court. However, such trials seem to be rare. See *1962 Hearings* 848, 909, 945.

[79] 1965 Dep't of Defense Directive para. VII. (J.).

[80] Jackson v. United States, 156 Ct. Cl. 183, 297 F.2d 939 (1962), *cert. dismissed*, 372 U.S. 950 (1963). See 1963 SUMMARY—REPORT 10; *1962 Hearings* 32-35, 158-59, 399, 963.

[81] 1965 Dep't of Defense Directive para. V. (A.)6.

[82] For instance, the writer represented a former serviceman who had received an undesirable discharge because of a state court conviction for rape and incest. Although no appeal was taken from the conviction, it was later set aside after being collaterally attacked; and the charges were dismissed. Thereupon he sought relief from the Army Board for the Correction of Military Records. The Correction Board's

As a general rule, a serviceman cannot be court-martialled for misconduct prior to service, or during a prior enlistment or period of service;[83] nor can the character of a discharge be based on such misconduct.[84] This principle is reaffirmed in the new directive by the requirement that prior service and pre-service activities not be considered in determining the type of discharge certificate.[85] However, this requirement does not apply to the decision of whether to retain the serviceman or to separate him; in making that decision the military authorities may consider activities antedating the current period of service.[86] Thus, in so far as the affixing of any stigma is concerned, the serviceman is protected, but he cannot insist on retaining his military status in spite of discreditable incidents which preceded his current period of service.

According to the directive, "Issuance of a General Discharge is appropriate when a member's military record is not *sufficiently meritorious* to warrant an Honorable Discharge as prescribed by the regulations of the service concerned."[87] This wording seems to reflect the suggestion of some military officials that a general discharge does not create a stigma but simply involves the failure to confer a special honor because of unusually meritorious service. Under this view the general discharge is equivalent to graduation; and the honorable discharge, to graduation *cum laude*.[88] A major difficulty with this approach is that the discharge statistics of the Armed Services reveal that an overwhelming percentage of the persons discharged under honorable conditions do receive an honorable, rather than a general, discharge;[89] a substantially smaller percentage of college graduates receive their degrees *cum laude*. Thus, the directive di-

recommendation to deny relief was not accepted in full by the Undersecretary of the Army, who directed a change in the character of the applicant's discharge.

In Branaman v. United States, Civil No. 1407-60, D.D.C., Nov. 8, 1961, discussed in *1962 Hearings* 962, the plaintiff had been discharged as undesirable after a state court conviction of robbery. Later he was pardoned and thereafter was committed to a mental institution. The Air Force Discharge Review Board and the Board for the Correction of Military Records each denied his application for a change of his discharge; and he also was unsuccessful in his court action.

[83] Hirshberg v. Cooke, 336 U.S. 210 (1949); see United States v. Gallagher, 7 U.S.C.M.A. 506, 22 C.M.R. 296 (1957).

[84] Harmon v. Brucker, 355 U.S. 579 (1958); Murray v. United States, 154 Ct. Cl. 185 (1961); *cf.* Schwartz v. Covington, 341 F.2d 537 (9th Cir. 1965).

[85] 1965 Dep't of Defense Directive para. V. (B.).

[86] *Id.* para. V. (C.).

[87] *Id.* para. VI. (B.). (Emphasis added.)

[88] *1962 Hearings* 334-35.

[89] *Id.* at 22-23, 827-29 (Army), 889-92 (Navy), 927-28 (Air Force).

verges from current practice by implying that the person receiving the honorable discharge has rendered service of merit—service above the average; in reality the honorable discharge is apparently issued unless the serviceman being separated has rendered service which is considerably below the average. Thus, a serviceman's receipt of a general, rather than an honorable, discharge has far more serious implications than would be perceived from the wording of the directive.

A serviceman discharged for unsuitability may receive either an honorable or a general discharge. If he has less than eight years of continuous active military service, the directive provides him the opportunity to make a written statement in his own behalf;[90] if he has more than eight years of continuous active service, he is considered to have such an equity in being retained on active duty that he receives the same basic protections that would exist if he were being considered for an undesirable discharge.[91] These protections include the right to a hearing before an administrative discharge board and representation by counsel.[92]

The administrative discharge board is to be comprised of at least three officers, and it may include a nonvoting member. According to the directive:

> The board functions as an administrative rather than a judicial body. Strict rules of evidence need not be observed. However, the chairman may impose reasonable restrictions as to relevancy, competency, and materiality of matters considered. When the board meets in closed session, only voting members will be present. The proceedings of the board will be maintained as prescribed by the Secretary of the Military Department but as a minimum shall contain a verbatim record of the findings and recommendations.[93]

The directive also provides that the respondent before an administrative discharge board may: appear in person, with or without counsel; challenge any voting member of the board for cause only; request the appearance of pertinent witnesses—although no subpoena power is available under present law to compel their attendance; testify or not, as he chooses; and question any witness who does appear before the board.[94]

---

[90] 1965 Dep't of Defense Directive para. VIII.(C.)1.
[91] *Id.* para. VIII.(C.)2.
[92] *Id.* paras. VIII.(C.)-(D.). See *id.* para. IV.(K.), defining "counsel."
[93] *Id.* para. IX.(B.).
[94] *Id.* para. IX.(C.).

It has already been noted here that the findings and recommendations of the board are binding in some respects upon the discharge authority; for instance, the discharge authority cannot override the board's recommendations by substituting a type of discharge less favorable to the respondent serviceman than that which the board recommended.[95] However, the discharge authority can separate a serviceman with an honorable or general discharge despite the board's recommendation of retention.[96] Suspending the execution of an approved discharge for a probationary period is another alternative available to the discharge authority.[97]

When the newly-issued Department of Defense Directive on administrative discharges is compared with the 1959 directive, which was considered during the 1962 Senate hearings of the Ervin subcommittee,[98] several significant clarifications and additions for the benefit of service personnel can be discerned. For example, rights to a board hearing and to legally-trained counsel in connection with that hearing have been broadened. The grounds for an undesirable discharge have been rendered more specific and more uniform for the different military departments. In this connection, the new directive omits the authority under the 1959 directive to issue an undesirable discharge for unfitness for "other good and sufficient reasons when determined by the Secretary concerned."[99] Requirements have been imposed for counselling the serviceman prior to initiating administrative discharge proceedings against him, thus providing him with a locus poenitentiae. Similarly, authority has been given to suspend the administrative discharge during a probationary period. Greater confidence has been reposed in the administrative discharge boards: their recommendations as to the type of discharge can no longer be overruled or ignored by higher military authorities to the detriment of the serviceman. And the respondent is afforded greater procedural protection before the boards. These changes, while implementing several of the recom-

[95] *Id.* para. V.(A.)3. This limitation corresponded to the Air Force and Army practice, but changed that of the Navy, Marine Corps and Coast Guard. See note 71 *supra.*

[96] 1965 Dep't of Defense Directive para. V.(A.)4.

[97] *Id.* para. X.

[98] *Administrative Discharges,* Department of Defense Directive 1332.14, Jan. 14, 1959, quoted in *1962 Hearings* 23.

[99] Department of Defense Directive 1332.14, Jan. 14, 1959, para. VII.(I.)6, quoted in *1962 Hearings* 26. See 1963 SUMMARY—REPORT 3, which criticized the differences in the definitions of "unfitness" among the various military departments.

mendations of the Subcommittee on Constitutional Rights,[100] do not include all of the reforms suggested by that subcommittee and later embodied in Senator Ervin's legislative proposals. Moreover, as will be discussed, the directive may not include all the safeguards which are necessary under recent judicial decisions.

B. *Safeguards After Discharge*

Before turning to the role of the courts, it seems important to examine the administrative remedies which are available to the serviceman after discharge[101]—the remedies which it may be necessary to exhaust before the aggrieved victim of administrative discharge action can seek judicial relief.

Discharge review boards are established for each service under 10 U.S.C. § 1553 to review the discharge or dismissal of any former member of the Armed Forces.[102] The statute provides that: "witnesses shall be permitted to present testimony either in person or by affidavit, and the person requesting review shall be allowed to appear before such board in person or by counsel."[103] Thus, the applicant for relief can automatically obtain a hearing before the discharge review board of the military department concerned. However, these boards, which are composed of military officers, have no subpoena power to compel the attendance of witnesses desired by the applicant; relief is available from such a board only after the discharge has occurred; and no award of pay can be made.[104]

Title 10 of the United States Code also provides that:

> The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that depart-

[100] See *id.* at 49-53.

[101] The administrative remedy of application to a correction board established under 10 U.S.C. § 1552 (1964) may also be available prior to the issuance of the discharge. See Schwartz v. Covington, 341 F.2d 537 (9th Cir. 1965), discussed in text accompanying note 119 *infra*.

[102] "[O]ther than a discharge or dismissal by sentence of a general court-martial. . . ." 10 U.S.C. § 1553 (a) (1964).

[103] 10 U.S.C. § 1553 (c) (1964).

[104] Additionally, the Air Force Discharge Review Board "is not authorized to revoke any discharge or dismissal, to reinstate any person in the military service subsequent to his separation, or to recall any person to active duty." 32 C.F.R. § 865.101 (b) (1965).

> ment when he considers it necessary to correct an error or remove an injustice.[105]

These correction boards, which are composed of civilians serving on a part time basis, do not grant hearings to an applicant as a matter of right;[106] and according to statistics presented in 1962 to the Senate Subcommittee on Constitutional Rights,[107] hearings are frequently denied. The authority of these boards is not limited to discharge matters: the relief forthcoming from them—subject to approval by the secretary of the military department involved—may extend to a change in the character of a discharge, complete elimination of the discharge and restoration to duty, restoration of rank, and elimination of derogatory information from an applicant's military records.

Adopting a liberal construction of the power of the correction boards and rejecting a contrary view of the Comptroller General, the Court of Claims ruled recently that the Army Board for the Correction of Military Records was empowered to correct not only statements of fact but also "conclusions" contained in an applicant's military records.[108] In upholding the authority of these boards to correct an applicant's military records in so far as those records reflect erroneous or mistaken legal views and even though there is no change in the hard facts recorded, the Court of Claims recognized that the boards would afford a second forum—alternative or additional to the courts—for consideration of what would otherwise be conventional judicial claims. So long as the records contain a mistake or omission, whether factual or legal, a correction board may consider the matter; and it may recommend payment to the applicant if the correction requires monetary relief.

---

[105] 10 U.S.C. § 1552 (1964).

[106] Boland v. United States, Civil No. 556-58, Ct. Cl., Jan. 22, 1965, held that there was no arbitrary action by a correction board in denying an oral hearing; a correction board is empowered to deny applications without a hearing. Similarly, in Merson v. United States, Civil No. 5-60, Ct. Cl., Oct. 15, 1965, the Court of Claims ruled that, although a hearing might have been helpful, it was not required under 10 U.S.C. § 1552 (1964).

[107] See 1963 SUMMARY—REPORT 11-12; *1962 Hearings* 863, 919, 954. Hearings were granted in less than 20% of the cases, although in a substantial percentage of cases relief was granted without a hearing. In his testimony at the January 1966 Senate hearings, a Washington attorney, Mr. Neil Kabatchnick, reiterated his criticism voiced in 1962 (see *1962 Hearings* 513) concerning the correction boards' failure to grant hearings as a matter of course; however, he conceded the need to provide a summary procedure for disposing swiftly of applications for relief that were clearly frivolous or without merit.

[108] Oleson v. United States, Civil No. 376-64, Ct. Cl., July 16, 1965.

A very recent case indicates that a correction board has not only the authority but also the duty to recommend relief if the applicant's legal rights have suffered at the hands of the military. In *Ashe v. McNamara,*[109] an ex-serviceman sought judicial relief after the Board for the Correction of Naval Records had failed to recommend corrective action regarding a punitive discharge imposed by a general court-martial.[110] The Court of Appeals for the First Circuit ruled that since a clear violation of the serviceman's right to the effective assistance of counsel had occurred during the trial by court-martial, the Correction Board was under a duty to recommend a correction of his records. The failure of the Board to perform this duty could, in turn, be remedied by the courts. Although the case itself concerned a punitive discharge, rather than military administrative action, the same duty would apparently exist for the correction boards to recommend correction of administrative action which had violated the legal rights of the applicant.

Since 10 U.S.C. § 1552 refers to the secretary of a military department "acting through boards of civilians," there has been some uncertainty concerning the scope of the authority possessed by the secretary to reject the board's recommendation for correction of an applicant's records. In *Hertzog v. United States,*[111] the plaintiff complained that on three separate occasions the Secretary of the Army had arbitrarily rejected the Army Correction Board's recommendation that his records be corrected to show a promotion. The Court of Claims concluded that, in light of 10 U.S.C. § 1552 and section 10 of the Administrative Procedure Act,[112] arbitrary action by either the Correction Board or the Secretary is subject to judicial review. According to the court:

> Where the Secretary in overturning the Correction Board's recommendation goes outside the record and issues before the Board for a basis for his decision, he must justify such a departure by explicitly stating the "policy reasons" behind such action. In the absence of such an explanation, we cannot determine upon

[109] 355 F.2d 277 (1st Cir. 1965).

[110] Ashe had been tried long before the enactment of the Uniform Code and the establishment of the Court of Military Appeals. Since the review of his conviction had been completed under the Articles for the Government of the Navy, there apparently was no procedure for review by the court.

[111] 167 Ct. Cl. 377 (1964).

[112] 60 Stat. 243 (1946), 5 U.S.C. § 1009 (1964).

> review that his discretionary action was not "arbitrary or capricious."[113]

Since the Secretary of the Army had provided no justification for rejecting the recommendation of the Correction Board, his action was arbitrary; and the claimant was entitled to a judgment for the back pay that he would have received if the Board's recommendation had been followed.[114] Thus, in practice, the power of a secretary to reject the findings and recommendations of his correction boards has been limited by the judicially imposed requirement that the rejection be supported by the records and evidence before the board, or by some explicitly stated policy reason.[115] The result of this requirement is greater responsibility for the correction boards; and presumably this greater responsibility will be reflected in greater concern with the composition and procedures of these boards.[116]

A correction board generally will not consider a discharge case until the applicant has exhausted his administrative remedies before the discharge review board of the same military department.[117] If, however, the application for relief includes a request for action which is beyond the jurisdiction of the discharge review board—for example, an award of back pay—the applicant will apparently be free to go directly to the correction board. The tactical choices resulting from these rules concerning exhaustion have been described in this way:

> In a discharge case you may decide to apply first to the Discharge Review Board and then later to the Correction Board; in this way you are getting two chances to present your client's case. However, I would suspect that if a hearing already has taken place be-

[113] 167 Ct. Cl. at 387.

[114] A dissent took the position that the Secretary of the Army had made a policy decision against *nunc pro tunc* promotions and that he was free to do so under 10 U.S.C. § 1552 (1964).

[115] Hertzog v. United States, 167 Ct. Cl. 377 (1964); Betts v. United States, 145 Ct. Cl. 530, 172 F. Supp. 450 (1959); Eicks v. United States, 145 Ct. Cl. 522, 172 F. Supp. 445 (1959); Proper v. United States, 139 Ct. Cl. 511, 154 F. Supp. 317 (1957).

[116] Similarly, as greater responsibility is given to the administrative discharge boards convened before issuance of the discharge—and as greater weight is given to their findings and recommendations, so that they cannot be summarily ignored by higher authorities (see 1965 Dep't of Defense Directive para. V. (A.))—greater attention will be devoted to appointing qualified members to these boards. It is a truism that the qualifications and abilities of a board's members frequently are in proportion to the authority possessed by that board.

[117] See, *e.g.*, Air Force Reg. 31-3, para. 7.

> fore a Discharge Review Board, a Correction Board would be much less likely to grant a hearing than if no prior hearing had occurred. Thus, you may choose to word your client's application for relief in such a way—by requesting back pay or other monetary relief—that it will fall outside the jurisdiction of a Discharge Review Board. Then it will be possible to go directly to the Correction Board without pausing for proceedings before the Discharge Review Board.[118]

Although the correction boards have been discussed as post-discharge administrative remedies, there are some indications that relief may be available from this source even before the discharge has been issued. In *Schwartz v. Covington*,[119] an Army enlisted man sought declaratory and injunctive relief to restrain Army officials from issuing him an undesirable discharge. The plaintiff had been investigated in 1960 for alleged homosexuality; but after his enlistment expired in 1961, he was reenlisted. Later there was a further investigation, and in 1963 a hearing took place before an administrative discharge board. The statements of five persons which had been made in 1960 and which pertained to the plaintiff's acts during a prior enlistment were received by the board over objection. This board recommended an undesirable discharge, whereupon the plaintiff commenced his court action, alleging arbitrariness on the part of military authorities and irreparable injury to him if the discharge were issued. Affirming the ruling of the district court, the Court of Appeals for the Ninth Circuit granted a stay of discharge action pending completion of action by the Army Board for the Correction of Military Records. Clearly the court considered that, although the Discharge Review Board could only act after a discharge had been issued, the Correction Board was available to the plaintiff even prior to discharge. Presumably the plaintiff's application for relief would include a request for deletion from his military records of all reference to acts in a prior enlistment and all administrative proceedings which in any way were predicated on such acts.

In *McCurdy v. Zuckert*,[120] an Air Force master sergeant sought an injunction against issuance of an administrative discharge predi-

[118] Paper by Robinson O. Everett, *Administrative Discharges—A Private Practitioner's Viewpoint*, presented during the Federal Bar Association meeting, in Chicago, Sept. 1965.

[119] 341 F.2d 537 (9th Cir. 1965).

[120] Civil No. 65-132, M.D. Fla., Nov. 4, 1965.

cated on his alleged lewd and indecent acts and a character and behavior disorder. Apparently the district court assumed that the plaintiff could seek relief from the Air Force Board for the Correction of Military Records without awaiting the issuance of a discharge.

Presumably an application for relief to a correction board will not halt or delay administrative discharge proceedings which are underway. Otherwise, in light of the time usually necessary for the correction boards to process an application,[121] discharges could be delayed for substantial periods of time by the mere filing of the application. However, the availability of the correction board as a forum prior to discharge may induce a court—as in *Schwartz v. Covington*—to enjoin the issuance of an administrative discharge until the board has acted.

II

THE JUDICIAL REMEDIES AVAILABLE FOR CONTESTING ADMINISTRATIVE DISCHARGES

A. *Expansion of Judicial Review*

The traditional rule for review of courts-martial was that "the single inquiry, the test, is jurisdiction."[122] However, after the Supreme Court ruled in *Johnson v. Zerbst*[123] that the jurisdiction of a civil court might be lost because the defendant had been deprived of his constitutional rights, the stage was set for a broader scope of collateral attack on court-martial convictions. Finally, in *Burns v. Wilson*,[124] the Court approved a broader standard of judicial review of court-martial convictions—although still a more limited judicial review than would take place in the event of collateral attack on a state court conviction.[125] Furthermore, by establish-

[121] See *1962 Hearings* 833-34, 899, 931. The average time for review ranged from four months for the Army Board for Correction of Military Records to eight months for the Air Force Board.

[122] Hiatt v. Brown, 339 U.S. 103, 111 (1950), qnoting *In re* Grimley, 137 U.S. 147, 150 (1890). See Johnson v. Sayre, 158 U.S. 109 (1895); *Ex parte* Mason, 105 U.S. 696 (1881); Dynes v. Hoover, 20 How. (61 U.S.) 65 (1857).

[123] 304 U.S. 458 (1938).

[124] 346 U.S. 137 (1953).

[125] Mr. Chief Justice Vinson, writing for himself and for three other Justices, took the position that the function of federal civil courts upon a military prisoner's application for habeas corpus is limited to determining whether the military have given fair consideration to each of the claims made in the application. *Id.* at 142. Only Mr. Justice Minton was apparently willing to apply the traditional test—that is, whether the court-martial

ment of the Court of Military Appeals, Congress provided a means of direct review of court-martial action by a court composed of civilians—a court which from the outset has demonstrated deep concern for the constitutional rights of servicemen.

A somewhat parallel development has taken place in connection with the judicial review of administrative discharge actions. Originally these discharges were considered to be completely insulated from any civil court review.[126] This insulation may have been one reason for the trend toward substitution of administrative discharge action for courts-martial after the Uniform Code became law.[127] However, in *Harmon v. Brucker*,[128] the Supreme Court allowed judicial review of an administrative discharge and held that the discharge had been issued illegally because it had been based on the serviceman's preinduction conduct. Since then a number of successful attacks on administrative discharge action have been made in the courts.

B. *The Court of Claims*

The Court of Claims has provided one route for attack on discharges. In this tribunal relief is limited to an award of money damages; the Court of Claims cannot directly order either restoration to duty or a change in the character of a discharge.[129] However, as a practical matter, a judgment for the plaintiff in the Court of Claims will usually enable him to obtain any further appropriate relief from the correction board; and absent such administrative relief, the Court of Claims judgment would presumably give rise to a collateral estoppel in the plaintiff's favor if he then instituted further action in a district court.

The plaintiff in the Court of Claims will seek to recover pay and

had jurisdiction of the person accused and of the act charged, and acted within its powers. *Id.* at 147 (concurring opinion).

In reviewing constitutional issues raised by a state prisoner, a federal district court is not limited in its powers by the circumstance that state courts have already considered these same issues and disposed of them adversely to the defendant. A logical question is why courts-martial, which are *ad hoc* tribunals, should be more insulated than state courts from collateral attack.

[126] See, *e.g.*, the views of the majority in Harmon v. Brucker, 243 F.2d 613 (D.C. Cir. 1957), *rev'd per curiam*, 355 U.S. 579 (1958); Sohm v. Dillon, 231 F. Supp. 973 (D.D.C. 1964); *cf.* Orloff v. Willoughby, 345 U.S. 83 (1953).

[127] See *1962 Hearings* 165.

[128] 355 U.S. 579 (1958).

[129] See Meador, *Judicial Determinations of Military Status*, 72 YALE L.J. 1293 (1963) for a general discussion of the remedies available through the Court of Claims and the district courts.

allowances which have been forfeited without statutory authority and in violation of the Government's obligations to him. He may also allege in his petition a breach of any enlistment contract under which he has served.[130] The Government will apparently not be allowed to defend that, subsequent to plaintiff's discharge, he has not rendered the military services contemplated under the enlistment.[131] However, the recovery is subject to a setoff for any wages earned in private employment.[132] The recovery of back pay by reason of an unlawful discharge will extend only through the term of the original enlistment and not up to the date of judgment; but, if the plaintiff had been serving under an enlistment for an indefinite period, then back pay would apparently be recoverable up to the date of judgment in the Court of Claims.[133]

An interesting variation of this principle was involved in a case where the Court of Claims ruled that the plaintiff-WAF had been discharged as undesirable in violation of the Air Force's own regulations.[134] The Government contended that, even if the discharge had been ineffective for some purposes, it was effective to terminate the WAF's entitlement to pay, since she was a reservist who was subject to release from active duty at any time. Relying on the

[130] See McAulay v. United States, 158 Ct. Cl. 359, 305 F.2d 836 (1962), *cert. denied,* 373 U.S. 938 (1963); Murray v. United States, 154 Ct. Cl. 185 (1961). In the latter case, Murray's counsel (the present writer) alleged that the Air Force, by its arbitrary and unlawful discharge of the plaintiff, had committed a breach of his enlistment contract, and that the damages should include not only any back pay that had accrued after his discharge but also the commuted value of the retirement benefits of which plaintiff had been deprived by the Government's repudiation of its contract. The court acquiesced in part in these contentions.

[131] See Bell v. United States, 366 U.S. 393 (1961).

[132] Garner v. United States, 161 Ct. Cl. 73 (1963); Clackum v. United States, 148 Ct. Cl. 404, 296 F.2d 226 (1960). The allowance of the setoff corresponds to the principle governing the recovery of back pay by employees whose loss of a job results from an unfair labor practice, as determined by the National Labor Relations Board. See NLRB v. Seven-Up Bottling Co., 344 U.S. 344 (1953); 31 AM. JUR., *Labor* § 311 (1958). In Murray v. United States, 154 Ct. Cl. 185 (1961), the plaintiff had received substantial veterans benefits from the Veterans Administration by reason of physical disability after his unlawful discharge from the Air Force. An effort was made to invoke the "collateral source" rule and argue that no setoff should be allowed since the disability benefits differed from wages; but the Commissioner had not accepted this view and it was not pressed before the Court of Claims. *But cf.* NLRB v. Gullett Gin Co., 340 U.S. 361 (1951).

[133] Smith v. United States, 155 Ct. Cl. 682 (1961); Murray v. United States, *supra* note 132; Clackum v. United States, *supra* note 132; In Garner v. United States, *supra* note 132, the plaintiff had been serving under an enlistment for an indefinite period; and therefore she was allowed to recover up through the date that an honorable discharge had been issued her in place of her original discharge.

[134] Clackum v. United States, *supra* note 132.

clear principle of *Vitarelli v. Seaton*[135]—where a similar argument by the Government had been unsuccessful in connection with the wrongful separation of a government employee who lacked either civil service tenure or employment rights—the Court of Claims held that the undesirable discharge issued to the WAF would not be recognized for any purpose.[136]

C. *Action in a District Court*

By reason of their concurrent jurisdiction with the Court of Claims up to $10,000, the federal district courts can be used as a forum for bringing an action in which back pay is sought.[137] More frequently, however, the plaintiff will enter a district court either a) to enjoin the issuance of a threatened discharge or b) to seek a judgment declaring that the discharge he has received is unlawful and void and ordering that he be reinstated and restored to duty.

In such cases the plaintiff, if he sought to sue in the federal judicial district where he resided or was stationed, was formerly often confronted with the objection that he had not joined as defendant an indispensable party—namely, the secretary of the military department. On the other hand, the plaintiff would often contend that the relief he sought did not involve any exercise of discretion and that, under the doctrine of *Williams v. Fanning*,[138] it sufficed for him to join as defendants the military commanders at a lower echelon, upon whom he could obtain service of process. This contention was more likely to succeed if the plaintiff were still in the service and were seeking to enjoin his prospective discharge, rather than to set aside an accomplished discharge and seek restoration to duty; the restoration to duty would more probably be viewed as involving an exercise of discretion at the secretarial level, so that it would be necessary to have the secretary as a party defendant.

[135] 359 U.S. 535 (1959).

[136] Clackum v. United States, 148 Ct. Cl. 404, 410, 296 F.2d 226, 229 (1960).

[137] Under 28 U.S.C. § 1346(a)(2) (1964), the district courts have concurrent jurisdiction with the Court of Claims up to $10,000. However, prior to 1964 the district courts, unlike the Court of Claims, could not entertain "any civil action or claim to recover fees, salary or compensation for official services of officers or employees of the United States." Act of Oct. 31, 1951, ch. 655, § 50(b), 65 Stat. 727. In 1964 this limitation was removed. Act of Aug. 30, 1964, 78 Stat. 699 (1964). Apparently the removal was prompted by the enactment in 1962 of 28 U.S.C. §§ 1361, 1391 (1964), which had made it feasible to sue in the district courts for reinstatement; it seemed appropriate to authorize a means by which, in most cases, accompanying claims for back pay could be disposed of in the same proceeding.

[138] 332 U.S. 490 (1947).

Fortunately, Congress eliminated this entire problem in 1962 by enacting a statute providing:

> A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.
>
> The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.[139]

In actions where the plaintiff sued in his own judicial district to obtain restoration to duty and reinstatement or some similar relief after discharge, he also formerly faced another difficulty: the relief sought was in the nature of mandamus, and only the federal district courts in the District of Columbia were deemed to possess authority to issue writs of mandamus. Fortunately again, Congress removed this obstacle in 1962 by providing:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.[140]

This legislation did not create new duties or liabilities on the part of the United States or its officials; but it made existing duties enforceable without the necessity of bringing an action in the District of Columbia.[141] The combined effect of these two new provisions was to make it unnecessary for an aggrieved serviceman or ex-serviceman to come to Washington—to the Court of Claims or the District Court there—in order to seek relief in a military discharge case. By reason of these provisions it was possible for the plaintiff in *Ashe v. McNamara*[142] to commence in a federal district court in

[139] 28 U.S.C. § 1391 (e) (1964).

[140] 28 U.S.C. § 1361 (1964).

[141] See, *e.g.*, Application of James, 241 F. Supp. 858, 860 (S.D.N.Y. 1965); Seebach v. Cullen, 224 F. Supp. 15, 17 (N.D. Cal. 1963), *aff'd*, 338 F.2d 663 (9th Cir. 1964), *cert. denied*, 380 U.S. 972 (1965).

[142] 355 F.2d 277 (1st Cir. 1965).

Massachusetts, where he resided, the litigation by which he sought judicial relief concerning his punitive discharge from the Navy.

The chief obstacle to judicial relief—especially prior to discharge—will result from the doctrine that a plaintiff must exhaust his administrative remedies. Thus, in *Beard v. Stahr*,[143] the efforts of an Army officer to enjoin the proceedings to separate him from the service were thwarted by this doctrine.[144] And a number of lower court decisions embody a similar view.[145]

However, in *Reed v. Franke*,[146] the Court of Appeals for the Fourth Circuit indicated that, despite failure to exhaust administrative remedies, a district court might exercise jurisdiction to decide substantial constitutional questions presented by a serviceman's claim that certain military procedures violated his constitutional rights. The plaintiff had sought a permanent injunction against the issuance to him of a general discharge for unsuitability —allegedly demonstrated by his drinking and his court-martial convictions. The court bypassed the exhaustion issue, and concluded on the merits that the regulations under which the discharge was to be issued had been validly promulgated pursuant to statute,[147] and

[143] 370 U.S. 41 (1962) (*per curiam*). The Court stated that "if appellant is removed, the Court is satisfied that adequate procedures for seeking redress will be open to him." *Id.* at 32.

[144] Beard was seeking relief prior to the action by the Secretary of the Army on the board's recommendation that he be separated. Perhaps the legal issues would have been quite different if the Secretary of the Army had already exercised his discretion in favor of separating Beard before injunctive relief was sought. See McCurdy v. Zuckert, Civil No. 65-132, M.D. Fla., Nov. 4, 1965.

[145] See, *e.g.*, Anderson v. McKenzie, 306 F.2d 248 (9th Cir. 1962); Michaelson v. Herren, 242 F.2d 693 (2d Cir. 1957). A denial of relief on grounds of failure to exhaust administrative remedies does not bar judicial relief at a later time. See Bland v. Connally, 293 F.2d 852 (D.C. Cir. 1961); Bland v. Hartman, 245 F.2d 311 (9th Cir. 1957). In Kirk v. United States, 164 Ct. Cl. 738 (1964), the Court of Claims ruled that the period of the statute of limitations was not tolled by reason of proceedings pending in the Army Discharge Review Board; and, as a predicate for this conclusion, it stated that nothing in 10 U.S.C. § 1553 (1964) requires that military personnel seek review by such a board before suing on the basis of an invalid discharge. Kirk v. United States, *supra* at 743. However, the Court of Claims has ruled that before a suit is brought for disability retirement pay, the plaintiff must first exhaust his administrative remedies by applying to the Retiring Board or the Physical Evaluation Board for an administrative determination of the right to retire for physical disability; and this is mandatory in the absence of extenuating circumstances. McAulay v. United States, 158 Ct. Cl. 359, 305 F.2d 836 (1962), *cert. denied*, 373 U.S. 938 (1963). In Krennrich v. United States, Civil No. 358-62, Ct. Cl., Jan. 22, 1965, the Court of Claims held that a former FAA employee had no standing to claim that her removal had been procedurally defective since she had failed to exhaust her remedy before the Civil Service Commission.

[146] 297 F.2d 17 (4th Cir. 1961).

[147] 5 U.S.C. § 22 (1964). Under this statute the secretary of a department may

that the remedy provided by Congress was constitutionally adequate,[148] even though it did not include a fact-finding hearing before discharge. Accordingly, the denial of the requested injunction was affirmed.

In *Schwartz v. Covington*,[149] another court of appeals, in staying issuance of a proposed undesirable discharge until the Army Board for the Correction of Military Records could act on the plaintiff's application for relief, noted that he had satisfied three basic requirements: 1) he had shown a likelihood that he would ultimately prevail; 2) he had demonstrated that there would be irreparable injury if he were discharged, even if he were later reinstated in the Army; and 3) he had shown that, in light of his non-sensitive duties, the Government would not suffer irreparable injury if the stay were granted.[150] Apparently this court of appeals would attach considerable significance to the stigma that results from an undesirable discharge, even if it is later revoked; and so the second condition—that of irreparable injury to the plaintiff—would appear relatively easy to satisfy. The injury to the Government from delaying the discharge would depend in large part on the type of duties to which the plaintiff would be assigned while further proceedings were taking place. The likelihood of ultimate victory by the plaintiff would depend on the facts of each case.

In *McCurdy v. Zuckert*,[151] the plaintiff, an Air Force master sergeant, sought an injunction against a proposed general discharge for unfitness. The Government moved to dismiss, arguing that the plaintiff had not exhausted the administrative remedies available in the Discharge Review Board and Correction Board;[152] and it contended that these remedies would provide the plaintiff with full and complete relief if he demonstrated that his discharge was illegal. The district court distinguished *Beard v. Stahr* on the ground that in that case further action by the Secretary of the Army in the exercise of his discretionary authority was needed to separate the plaintiff, and the suit was hence premature; on the other hand, no

prescribe regulations for the government of his department; and in the court's opinion this authority permits prescribing regulations concerning administrative discharges. 297 F.2d at 23. The regulations under attack came within this statutory authority.

[148] 10 U.S.C. §§ 1552-53 (1964).

[149] 341 F.2d 537 (9th Cir. 1965).

[150] *Id.* at 538.

[151] Civil No. 65-132, M.D. Fla., Nov. 4, 1965.

[152] Such remedies are available under 10 U.S.C. §§ 1552-53 (1964).

further act or decision by the Secretary of the Air Force would be needed in order to separate Sergeant McCurdy.[153] Furthermore, the administrative remedies available to McCurdy were somewhat limited: under Air Force regulations the Discharge Review Board "is not authorized to revoke any discharge or dismissal, to reinstate any person in the military service subsequent to his separation, or to recall any person to active duty";[154] and an applicant need not even be granted a hearing by the Correction Board.

Citing an earlier case,[155] the court concluded that plaintiff's omission to seek relief through the Correction Board did not deprive the court of jurisdiction, but that, in its discretion, it might refrain from exercising its jurisdiction pending exhaustion of administrative remedies. In deciding whether to exercise its jurisdiction immediately and to enjoin issuance of the discharge, the district court considered that, under the tests of *Schwartz v. Covington*, it should determine: 1) the existence of irreparable injury to plaintiff if the requested relief were not granted; 2) substantial harm to other interested persons; 3) harm to public interests; and 4) the likelihood that the petitioner would prevail on the merits of the appeal.[156]

The court determined that if the plaintiff were discharged, he would suffer irreparable injury to his reputation, even if subsequently the discharge action were corrected. Moreover, under the particular circumstances of the case, exercising the court's jurisdiction by staying the issuance of the discharge would not injure the interests of others nor the public interest. However, the court denied the injunction, concluding that the plaintiff had not satisfied the fourth criterion: the court felt unable to make an affirmative finding that plaintiff would likely prevail on the merits. The court added:

> That is not in any way a finding or an indication of any opinion by this Court as to the truth or falsity of the charges of lewd acts or of a character disorder, or whether or not plaintiff's legal position that the AFR 39-17 procedure is in lieu of disciplinary action has merit. Rather it means only that such issues are for determination by the Air Force in proper accordance with legally established procedures which provide the plaintiff his constitutional safeguards. Whether the procedure meets consti-

[153] McCurdy v. Zuckert, Civil No. 65-132, M.D. Fla., Nov. 4, 1965.
[154] 32 C.F.R. § 865.101 (b) (1965).
[155] Ogden v. Zuckert, 298 F.2d 312, 317 (D.C. Cir. 1961).
[156] McCurdy v. Zuckert, Civil No. 65-132, M.D. Fla., Nov. 4, 1965.

> tutional tests and whether such procedure has been properly followed here should first be ruled upon by a review board created by Congress. Judicial review should await final administrative action in this case.[157]

This pronouncement leaves unclear how a plaintiff satisfies a court that there is a likelihood of his prevailing on the merits. Apparently there is a strong judicial unwillingness to intervene in such situations—even while asserting jurisdiction to grant relief. The courts seem willing to concede that the receipt of an administrative discharge—even a general discharge, which is under honorable conditions—may create irreparable injury to the recipient. They do not seem disturbed by the fact that, if the discharge is enjoined, the serviceman will continue to receive pay and allowances while the case is pending final disposition. But in the exercise of their discretion, the courts apparently do not wish to bypass the boards which Congress has established.[158]

III

GROUNDS FOR JUDICIAL ATTACK ON ADMINISTRATIVE DISCHARGE ACTION

A. *Failure to Follow Regulations: Conflicts in Regulations*

Violation by military authorities of their own regulations has proved to be the most fruitful basis for attacking administrative discharges in the courts. Even though these regulations would be subject to change, they are binding until changed—binding even on their authors.[159] Thus, discharges have been held invalid for such things as: failure to give the serviceman the notice required by naval regulations or to convene a medical board of survey also required by these regulations;[160] non-adherence by an Air Force separation board to that service's own regulations;[161] or omission of the opportunity for an officer to consult with counsel before submitting his resiguation, as required by Air Force regulations.[162]

---

[157] *Ibid.*

[158] These boards are established under 10 U.S.C. §§ 1552-53 (1964). The correction boards have been viewed as having the authority to correct erroneous legal conclusions as well as factual mistakes. See Oleson v. United States, Civil No. 376-64, Ct. Cl., July 16, 1965.

[159] Vitarelli v. Seaton, 359 U.S. 535 (1959); Service v. Dulles, 354 U.S. 363 (1957).

[160] Sofranoff v. United States, 165 Ct. Cl. 470 (1964); Smith v. United States, 155 Ct. Cl. 682 (1961).

[161] Cole v. United States, Civil No. 112-63, Ct. Cl., June 11, 1965.

[162] Ingalls v. Zuckert, 309 F.2d 659 (D.C. Cir. 1962). It has been held that due

In *Roberts v. Vance*,[163] the plaintiff, a controversial reserve officer with more than eighteen years of active federal service, had been released from active duty on the personal order of the Secretary of the Army. In setting aside this order, a court of appeals ruled that the Secretary was bound by his own regulations, and that his personal decision to release Roberts was not equivalent to the review of the proposed release which was required by Army regulations.

Another case involved a plaintiff who had accepted an undesirable discharge based on an alleged incident of sodomy.[164] The acceptance was apparently prompted by the threat of a general court-martial for this same incident. Plaintiff was not informed, however, that under the terms of a naval directive, special permission would be required from the Secretary of the Navy in order to court-martial him, since he had previously been acquitted of the same offense by a state court. In allowing plaintiff to recover back pay for the unexpired portion of his enlistment, the Court of Claims ruled that the Navy's directive had been violated by the manner in which plaintiff had been induced to accept the discharge, and that the discharge, therefore, was void.

The leading case of *Harmon v. Brucker*,[165] which established the reviewability of administrative discharges, involved non-compliance with military regulations by basing the discharge on conduct prior to induction. In another case the discharge was illegal because it had been based on conduct in a prior enlistment, in violation of Air Force directives.[166] The Department of Defense Directive issued on December 20, 1965, continues the rule that pre-service and prior service activities will not be considered in determining the

process does not necessarily require that a serviceman be granted a hearing prior to the issuance of an administrative discharge. See Redwine v. Zuckert, 317 F.2d 336 (D.C. Cir. 1963); Reed v. Franke, 297 F.2d 17 (4th Cir. 1961). However, if a regulation requires that a hearing be granted before discharge, then non-compliance with that regulation would render the discharge illegal and void.

[163] 343 F.2d 236 (D.C. Cir. 1964). *But cf.* Unger v. United States, 164 Ct. Cl. 400, 326 F.2d 996 (1964).

[164] Middleton v. United States, Civil No. 436-61, Ct. Cl., April 16, 1965; *cf.* Neal v. United States, 34 U.S.L. WEEK 2394 (Ct. Cl. Jan. 20, 1966).

[165] 355 U.S. 579 (1958).

[166] Murray v. United States, 154 Ct. Cl. 185 (1961). In Davis v. Stahr, 293 F.2d 860 (D.C. 1961), which involved the discharge of an inactive reservist, the court reasoned that, just as preinduction conduct cannot be used to support a discharge, the failure to disclose such conduct also should not be considered by an administrative discharge board; otherwise the rule of *Harmon v. Brucker* could be readily bypassed.

type and character of a discharge certificate;[167] however, it now authorizes the consideration of such activities in determining whether a serviceman shall be retained.[168]

The courts have not accepted the contention that the enactment of the Uniform Code of Military Justice preempted the field of misconduct by servicemen and deprived the Armed Services of the power to discharge on that basis.[169] Nor have they yet recognized any right of a serviceman to request trial by court-martial for his misconduct in lieu of administrative discharge proceedings.[170]

Another possible line of attack on the use of administrative discharges for misconduct is implicit in *Sofranoff v. United States*.[171] The plaintiff, a Marine Corps master sergeant, had received a general discharge after an incident of alleged child molestation and an ensuing psychiatric examination. Sofranoff had demanded trial by court-martial for the child molestation, but his request was not granted. Ostensibly his discharge was for unsuitability and predicated on schizoid personality traits. A Marine Corps directive provided that enlisted personnel should not be recommended for discharge for unsuitability as a punishment or in lieu of court-martial. The Court of Claims reasoned that if the discharge were really based upon child molestation, it would violate the prohibition against administrative discharge as a substitute for criminal

[167] 1965 Dep't of Defense Directive para. V.(B.).

[168] *Id.* para. V.(B.)-(C.). *Cf.* Schwartz v. Covington, 341 F.2d 537 (9th Cir. 1965), involving a discharge board's consideration of alleged homosexual activities in a prior enlistment together with a psychiatrist's opinion that the serviceman was a homosexual. To what extent may testimony of prior misconduct in a prior enlistment be used to substantiate an expert opinion as to the respondent serviceman's present condition or to corroborate testimony as to similar misconduct during the present period of service? See EVERETT, MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES 211-15 (1956).

[169] *E.g.*, Rowe v. United States, 167 Ct. Cl. 468 (1964), *cert. denicd*, 380 U.S. 961 (1965); Grant v. United States, 162 Ct. Cl. 600 (1963).

[170] *Ibid.* See also McCurdy v. Zuckert, Civil No. 65-132, M.D. Fla., Nov. 4, 1965; Sofranoff v. United States, 165 Ct. Cl. 470 (1964). One of Senator Ervin's bills, S. 758, 89th Cong., 1st Sess. (1965), would allow a serviceman to elect trial by court-martial in the event separation under other than honorable conditions is contemplated by reason of specific acts of misconduct. This election has several parallels in military law. Thus, Uniform Code of Military Justice art. 4, 10 U.S.C. § 804 (1964) grants an officer dismissed by the President the election to demand trial by general court-martial; art. 15, 10 U.S.C. § 815 (1964) grants the option of trial by court-martial instead of nonjudicial punishment; and art. 20, 10 U.S.C. § 820 (1964) provides that an accused who has not been permitted to refuse punishment under article 15 may object to trial by summary court-martial and be tried by special or general court-martial.

[171] 165 Ct. Cl. 470 (1964).

action; and if it were based on a personality disorder, another Marine Corps directive had been violated because of failure to convene a medical board of survey. In either event the discharge was invalid, and the plaintiff was entitled to back pay to the end of his enlistment.

In an earlier case where a plaintiff had been given a general discharge for unsuitability,[172] the Court of Claims concluded that the discharge could not have been issued because of any offense or conviction; otherwise the discharge would have violated the provision of a Navy regulation that " 'individuals shall not be recommended for discharge for unsuitability as a punishment or in lieu of court-martial.' "[173]

Since similar wording has appeared in several military directives concerning administrative discharges,[174] the question is presented as to when an administrative discharge is to be considered "in lieu of" punishment or disciplinary action. In light of *Sofranoff*, it is arguable that such wording in a directive precludes administrative discharge of a serviceman by reason of misconduct for which he has not been tried by court-martial. Such an interpretation would protect the serviceman against the bypassing of safeguards provided by Congress in the Uniform Code; and thus it might prove appealing to the courts. However, this interpretation—under which administrative discharges for misconduct untried by court-martial would be void—probably would result in a prompt change in the applicable regulations.

B. *Failure to Give Proper Effect to Collateral Proceedings*

Sometimes criminal proceedings are initiated against a serviceman for the same alleged misconduct which is later used as the basis for an administrative discharge. If the proceedings are in a civil court and result in conviction of a serious offense, then that conviction may itself be the basis for a discharge.[175] Unless the

[172] Smith v. United States, 155 Ct. Cl. 682 (1961).

[173] *Id.* at 687.

[174] *E.g.*, Air Force Reg. 39-17, para. 1 (1959) provides as to proposed discharges for unfitness that: "Commanders will not take action under this Regulation in lieu of taking disciplinary action."

[175] Redwine v. Zuckert, 317 F.2d 336 (D.C. Cir. 1963); *cf.* Cook v. United States, 164 Ct. Cl. 438 (1964). Under 1965 Dep't of Defense Directive para. VII. (J.)1., discharge with an undesirable discharge is authorized for conviction by civil authorities —state, federal, or foreign—of an offense for which the maximum penalty under the Uniform Code would be confinement in excess of one year or which involves moral

conviction is later set aside on appeal[176]—or perhaps by a collateral attack—the discharge will be valid.

If the civil court trial results in an acquittal, the Armed Services are reluctant to court-martial the serviceman for the same misconduct.[177] However, they may seek to discharge him administratively for this misconduct.[178] (Presumably the military do not wish to be bound by the outcome in a forum where they cannot participate in presenting the case against the defendant and where guilt must be established beyond reasonable doubt pursuant to strict rules of evidence.) In this situation there is apparently no bar to the administrative discharge,[179] unless in some way military authorities have violated their own regulations.[180]

If the serviceman has been convicted in a court-martial, but his sentence does not include a punitive discharge, then an objection may be raised to the use of this conviction as the sole basis for an administrative discharge—at least, if the discharge proposed is under other than honorable conditions. The serviceman might argue that the same issue has already been litigated between the Government and the serviceman.[181] But if the discharge proposed is an honor-

turpitude. Since the administrative discharge is not viewed as a punishment, there is no double jeopardy problem, even though the civil conviction may have been in a federal court. Conviction in a federal court of bribery automatically terminates the convicted defendant's status as an officer in the Armed Services. Motto v. United States, 348 F.2d 523 (Ct. Cl. 1965).

[176] *Cf.* Jackson v. United States, 156 Ct. Cl. 183, 297 F.2d 939 (1962), *cert. dismissed,* 372 U.S. 950 (1963).

[177] See *1962 Hearings* 848, 909, 945. See also Middleton v. United States, Civil No. 436-61, Ct. Cl., April 16, 1965.

[178] See Middleton v. United States, *supra* note 177.

[179] If the acquittal was in a state court, then double jeopardy and res judicata would not apply under traditional doctrine, since different sovereigns are involved. Moreover, even if the acquittal has taken place in a federal civil court, there may be difficulties in applying double jeopardy and collateral estoppel principles in view of the differences in the types of proceeding involved and in the applicable burdens of proof. For some cases where the separation of government employees was upheld despite their acquittal in civil courts of the alleged misconduct on which the separation was predicated, see Prater v. United States, Civil No. 217-63, Ct. Cl., July 16, 1965; Camero v. United States, Civil No. 192-61, Ct. Cl., May 14, 1965; Finn v. United States, 152 Ct. Cl. 1 (1961); *cf.* Cook v. United States, 164 Ct. Cl. 438 (1964). These cases would seem fully applicable to administrative proceedings where a separation from the Armed Services with an honorable discharge was contemplated. If an undesirable discharge —or perhaps only a general discharge—were being proposed, the affixing of stigma to the respondent might differentiate the situation from that of the government employee whose service is being terminated.

[180] Middleton v. United States, Civil No. 436-61, Ct. Cl., April 16, 1965.

[181] This would be true if the court-martial was one which had the power to impose a punitive discharge. Under MANUAL FOR COURTS-MARTIAL ¶ 79a, the "function of a summary court-martial is to exercise justice promptly for *relatively minor offenses*

able or general discharge for unsuitability—unsuitability which is allegedly demonstrated by the conviction—then the situation is complicated by the fact that a court-martial cannot sentence an accused to be separated honorably or under honorable conditions. Of course, typically the conviction will not be used by itself as a basis for discharge, but instead will be considered along with other evidence which tends to establish a pattern of behavior. In this event, the conviction is being given a legitimate collateral effect; and the serviceman probably has little basis for complaint.[182]

There have been instances of administrative discharge proceedings based on the same charges—and even the same evidence—which the Government had theretofore used unsuccessfully in a court-martial prosecution.[183] This practice seems highly undesirable —especially if the proposed discharge would be under other than honorable conditions.[184]

C. *Command Influence*

Command influence on courts-martial has been a major concern of military justice.[185] Possibilities of such influence obviously also exist over the members of administrative discharge boards—whose members frequently are under the command of the officer who appoints the board and who, therefore, are somewhat dependent on him as to future assignments and promotions. The exercise of

under a simple form of procedure." (Emphasis added.) Since the offenses tried by a summary court-martial are "relatively minor," they would not seem entitled to great weight as a basis for an administrative discharge. Moreover, since the "simple form of procedure" involved in the summary court-martial does not include a defense counsel for the accused and involves a combination of the roles of judge, juror, prosecutor, and defense attorney in the single summary court-martial officer, a conviction returned under such a procedure does not provide a strong basis for later affixing to a serviceman the stigma of an undesirable discharge.

[182] See note 40 *supra*. The habitual offender statutes also attach a legitimate collateral consequence to a conviction by allowing the conviction to be considered later, along with other convictions, as a basis for imposing a more severe punishment. See Gryger v. Burke, 334 U.S. 728 (1948).

[183] The writer recalls one case involving an Army sergeant where apparently this had taken place. Congressman Robert Michel of Illinois was among those who protested the injustice in this instance (see 109 CONG. REC. 16173 (1963)); and ultimately the Army Board for the Correction of Military Records granted relief.

[184] The stigma affixed by an undesirable discharge—or, to a lesser extent, by a general discharge—might serve to differentiate these cases from those involving government employees, where only termination of the right to pay is involved. See cases cited note 179 *supra*.

[185] See, *e.g.*, EVERETT, *op. cit. supra* note 168, at 11-13, 166-68; Farmer & Wels, *Command Control—or Military Justice?*, 24 N.Y.U.L.Q. 263 (1949); *1962 Hearings* 840-42, 905, 937.

influence often allegedly takes place by means of a briefing which a military commander has furnished to the board members before the hearing. Such briefings as to relevant principles and policies are not uncommon in military administrative proceedings.

In *Cole v. United States*,[186] the Court of Claims considered the plaintiff's contention that his separation from the Air Force was wrongful because of command influence—allegedly by way of a pre-hearing briefing by a high commander—exercised over the members of the board before which he had sought to show cause why he should be retained in the service. In comments which might be described variously as dicta or as an alternative holding, the Court of Claims made clear its disapproval of this practice by stating that the briefing "jeopardized plaintiff's rights to that due process which the Fifth Amendment extends to military personnel."[187]

Similar briefings are specifically authorized by the *Manual for Courts-Martial* for use in instructing personnel of courts-martial,[188] and the Court of Military Appeals has declined to disallow the practice.[189] Since the rights of an accused before a court-martial seem at least as broad as those of a respondent before a board which is considering his administrative separation, it is hard to reconcile the pronouncement by the Court of Claims in *Cole* with the countenancing of pre-trial instruction of court-martial members.

D. *Lack of Fair Hearing: Right to Counsel, Confrontation, and Cross-Examination*

Because of the stigma and other serious consequences resulting from an undesirable discharge, it can be argued that the respondent must be furnished with legally-trained counsel.[190] If the grounds for discharge stated in the applicable regulation seem vague, a due process objection might be raised on this ground—although military law has long been tolerant of considerable vagueness.[191] How-

[186] Civil No. 112-63, Ct. Cl., June 11, 1965.

[187] *Ibid.*

[188] MANUAL FOR COURTS-MARTIAL ¶ 38.

[189] United States v. Danzine, 12 U.S.C.M.A. 350, 30 C.M.R. 350 (1961). However, one branch of the service, the Army, later determined to eliminate pre-trial instructions to court-martial members. *1962 Hearings* 869-70.

[190] *Cf.* Gideon v. Wainwright, 372 U.S. 335 (1963); Johnson v. Zerbst, 304 U.S. 458 (1938); Application of Stapley, 246 F. Supp. 316 (D. Utah 1965). *But cf.* LeBallister v. Warden, 247 F. Supp. 349 (D. Kan. 1965); United States v. Culp, 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963).

[191] In upholding the discharge of a West Point cadet who had been found guilty of "quibbling" in violation of the Cadet Honor Code, the court of appeals rejected

ever, probably one of the most promising means of challenge to administrative discharge action concerns the rights of confrontation and cross-examination.

To some extent the courts are reluctant to hold that rights of confrontation have been curtailed by military regulations unless the curtailment was clearly directed by the regulations and the regulations, in turn, were clearly within the authority given to military authorities by the Congress.[192] However, Judge Holtzoff's recent opinion in *Gamage v. Zuckert*[193] poses a more fundamental challenge to military administrative discharge proceedings. The separation from service which was being contested there followed an appearance by the plaintiff before an Air Force board of officers to show cause why he should be retained in the service. Among other things he had allegedly falsified weather reports—presumably in order to improve *nunc pro tunc* his record as a weather observer and prognosticator.

Judge Holtzoff reasoned that, although common law rules of evidence are not required in these show-cause hearings, the requirements of a "fair hearing" bar use in evidence of ex parte accusatory statements of witnesses who are not produced to testify orally or by deposition.[194] The court emphasized that "this involves a very serious charge, namely, falsification of records."[195]

The statute under which the separation had been initiated requires a "fair and impartial hearing,"[196] and the court concluded that confrontation of witnesses is a vital part of a "fair hearing."[197] Nor did Judge Holtzoff seem disturbed by the fact that the board of officers before which the plaintiff had appeared lacked subpoena power and therefore could not compel the appearance in court of

the attack of vagueness by saying that "we feel sure that it is not the province of a court to determine what conduct is condemned, and what is not, by the 'common law' of the Corps of Cadets—a creature of the Cadets themselves." Dunmar v. Ailes, 348 F.2d 51, 55 (D.C. Cir. 1965). *Cf.* Carter v. McLaughry, 183 U.S. 365, 401 (1902). For another area in which the military "common law" has been operative, see Everett, *Article 134, Uniform Code of Military Justice—A Study in Vagueness*, 37 N.C.L. REV. 142 (1959).

[192] *Cf.* Davis v. Stahr, 293 F.2d 860 (D.C. Cir. 1961).

[193] Civil No. 1124-64, D.D.C., Nov. 9, 1965. Concerning the use of depositions in courts-martial, see Everett, *The Role of the Deposition in Military Justice*, Military L. Rev., Jan. 1960, p. 131.

[194] Gamage v. Zuckert, Civil No. 1124-64, D.D.C., Nov. 9, 1965.

[195] *Ibid.*

[196] 10 U.S.C. § 8782(b) (1964).

[197] Gamage v. Zuckert, Civil No. 1124-64, D.D.C., Nov. 9, 1965.

any unwilling witnesses. Apparently the court considered that if the absence of the subpoena power created problems in providing confrontation, then Congress could enact suitable legislation extending the subpoena power to boards of this type.

Although the court predicated its result upon the statutory requirement of a "fair and impartial hearing," one could hardly contend that any requirement of a hearing—whether in a statute or a regulation—envisaged less than a "fair and impartial" hearing.[198] Thus, the doctrine of *Gamage v. Zuckert*, if accepted by other courts, would seem broadly applicable to administrative discharge proceedings—except in the decreasing number of instances where military regulations grant no hearing at all to the serviceman being considered for discharge.

Of course, in invoking the right of confrontation, a respondent may be subject to requirements that he make efforts of his own to obtain a witness' presence before any burden is placed on the Government to do so.[199] However, in light of *Gamage*, the respondent who takes the proper procedural steps will apparently be able to insist on being allowed to cross-examine any witness whose testimony or statement is being used to establish misconduct on his part. Since an administrative discharge board lacks the subpoena power possessed by courts-martial,[200] the respondent's insistence on confrontation of witnesses who are not subject either to subpoena or to military orders and who will not testify voluntarily may require that military authorities prefer charges for trial by court-martial—where the witnesses can be obtained by subpoena. Thus, the newly-recognized requirements of confrontation are helping to reverse the pendulum that once swung towards the use of administrative discharges in lieu of court-martial action.

If a right of confrontation is recognized in some administrative discharge hearings, must it be recognized in all such hearings; or can it be limited only to those where the discharge is being proposed by reason of misconduct? Would this right exist, for example, where the respondent was being considered for separation because of unsuitability or substandard performance? The *Gamage* opinion does

[198] *Cf.* Morgan v. United States, 298 U.S. 468 (1936).

[199] *Cf.* Williams v. Zuckert, 372 U.S. 765, *dismissal of cert. vacated per curiam*, 372 U.S. 765 (1963); Hanifan v. United States, 34 U.S.L. WEEK 2358 (Ct. Cl., Dec. 17, 1965); DeNigris v. United States, Civil No. 18-63, Ct. Cl., Feb. 19, 1965.

[200] Uniform Code of Military Justice art. 47, 10 U.S.C. § 847 (1964).

not give a clear answer to these questions. Of course, if confrontation is read into the requirement of a "hearing" in all statutes and regulations pertaining to military administrative discharges, the same interpretation could also be advanced with respect to hearings authorized by statute or regulation in connection with separations and other personnel actions affecting civilian government employees.

E. *Cruel and Unusual Punishment*

The constitutional safeguard against cruel and unusual punishments might not support the argument that an administrative discharge had been totally disproportionate to the misconduct or deficiencies on which it was based. However, in particular cases it might be argued that the discharge was so out of proportion to the offense as to be completely beyond the contemplation of the regulations under which the discharge had purportedly been issued. Support for this position could be derived from cases recognizing that the separation of a government employee for a minor infraction after many years of good service may be arbitrary and capricious.[201] Fortunately, the requirements of counselling that have been imposed by the most recent Department of Defense Directive[202] will help avoid the issuance of discharges that seem arbitrary and capricious when measured against the respondent's failures.

At one time the Government contended that the issuance of a general discharge, which is a discharge under honorable conditions, does not prejudice a serviceman in any way and therefore should not be deemed subject to judicial relief.[203] This position has long since been repudiated by the courts;[204] indeed, in the leading case of *Harmon v. Brucker*,[205] the serviceman had been discharged with a general discharge. However, it is still unclear whether the same grounds of attack are available with respect to a general discharge as would exist with respect to an undesirable discharge. And does

[201] Clark v. United States, 162 Ct. Cl. 477 (1963). See also DeNigris v. United States, Civil No. 18-63, Ct. Cl., Feb. 19, 1965.

[202] 1965 Dep't of Defense Directive para. V.(A.)1.

[203] See Ives v. Franke, 271 F.2d 469, 472 (D.C. Cir. 1959) (dissenting opinion), *cert. denied*, 361 U.S. 965 (1960).

[204] Davis v. Stahr, 293 F.2d 860 (D.C. Cir. 1961); Sofranoff v. United States, 165 Ct. Cl. 470 (1964); Murray v. United States, 154 Ct. Cl. 185, 187-88 (1961).

[205] 243 F.2d 613, 616 (D.C. Cir. 1957), *rev'd per curiam*, 355 U.S. 579 (1958).

the answer depend on the purported basis for the general discharge?[206]

If a discharge is successfully attacked and is held void, then it is void for all purposes.[207] It does not serve to terminate pay and allowances, even though military authorities, in their discretion, could readily have taken action which would have terminated the serviceman's military status and right to pay.[208]

IV

The Ervin Legislative Proposals

Some of Senator Ervin's eighteen bills which would change procedures used in connection with administrative discharges and military justice may have been considered revolutionary and drastic by the Armed Services when they were originally introduced in 1963. However, in light of some of the recent court decisions in this area, a thorough examination of these proposals reveals that today they can hardly be characterized by anyone as extreme.

The first of these bills, S. 745, would amend the Uniform Code to establish by statute for each service branch an independent field judiciary for general courts-martial. The members of this judiciary would be officers[209] called "military judges"[210] whose primary duty would be as law officers of general courts-martial. They would be insulated from control of the commanders appointing them. A

[206] It might be argued that the general discharge must be surrounded by the same safeguards available in the case of the undesirable discharge if the general discharge is to be predicated on misconduct. This is analogous to the view sometimes taken that an offense can be infamous, or can involve moral turpitude, regardless of the punishment that can be imposed for its commission.

[207] Middleton v. United States, Civil No. 436-61, Ct. Cl., April 16, 1965; Motto v. United States, 348 F.2d 523 (Ct. Cl. 1965); Clackum v. United States, 148 Ct. Cl. 404, 296 F.2d 226 (1960). On the other hand, it is possible to have the character of a discharge changed without affecting in any way the fact of discharge. Unger v. United States, 164 Ct. Cl. 400, 326 F.2d 996 (1964).

[208] Vitarelli v. Seaton, 359 U.S. 535, 539-40 (1959); Clackum v. United States, *supra* note 207, at 410, 296 F.2d at 229.

[209] S. 745, 89th Cong., 1st Sess. § 3, at 2 (1965). The bill would also authorize the use of civilians as law officers ("military judges"). The Department of Defense has indicated opposition to this alternative—apparently, in part, on the theory that it represents an implied criticism of the lawyer in uniform.

[210] S. 745, 89th Cong., 1st Sess. 1 (1965). This change of title is designed to enhance the prestige of the law officer. Moreover, it conforms with the pronouncements of the Court of Military Appeals to the general effect that the powers and duties of law officers of general courts-martial should be assimilated as much as practicable to those of federal district judges. See Miller, *Who Made the Law Officer a "Federal Judge"?*, Military L. Rev., April 1959, p. 39.

system of this type has already been established by the Army and the Navy under their own directives, and has greatly improved the efficiency of their military justice operations.[211] The Air Force has declined to create a field judiciary because of an anticipated adverse effect on the flexibility considered desirable by that service in dealing with military legal personnel.

This proposal represents an attempt to bring courts-martial and their procedures more into line with civilian practice by providing them with a real "judge." Although S. 745 does not deal with administrative discharges, it should establish some precedent for providing an independent legal adviser—like a judge—to preside over the hearings of administrative discharge boards, whose findings and recommendations—especially if an undesirable discharge is involved—may have quite serious implications for the respondent serviceman.

One possible goal would be the creation of an inter-service field judiciary from which would be chosen persons to preside not only over general courts-martial but also over special courts-martial, if a bad conduct discharge is to be adjudged, and over administrative discharge boards considering issuance of undesirable discharges. The members of this judiciary would be insulated from the control of military commanders in the field and, in the instance of military officers,[212] their effectiveness reports—used for determining promotions, transfers, and assignments—would be prepared under procedures designed to insulate them from possible command influence.

Creation of a Navy Judge Advocate General's Corps is authorized by S. 746; the purpose of this bill would be to improve the status and quality of the Navy's uniformed attorneys. Presumably such improvement would benefit the quality of representation provided to respondents in administrative discharge matters.

Under S. 747 a unified Department of Defense Board for the Correction of Military Records would be substituted for the separate boards now authorized for each military department.[213] The Board

[211] In the Army this system reduced law officer error from 4% to 1.2%; in the Navy and Marine Corps from 8.7% to approximately 2%. See 1963 SUMMARY—REPORT 27. See also Wiener, *The Army's Field Judiciary System: A Notable Advance,* 46 A.B.A.J. 1178 (1960).

[212] Under the present wording of S. 745 civilians could also serve in the field judiciary. See note 209 *supra.*

[213] Separate boards are authorized by 10 U.S.C. § 1552 (1964).

members would serve on a full time basis, rather than part time as under the present practice; they would be appointed to three year terms.[214] The purpose of this bill is to provide greater uniformity among the service branches in the review of administrative discharges and other personnel actions,[215] as well as to enhance the prestige, independence and responsibility of the correction boards. Since the courts have already enhanced the responsibility and power of the correction boards,[216] S. 747 seems in line with present judicial thinking.

Improved procedures for the review of courts-martial are the sole concern of S. 748;[217] but S. 749 pertains to both military justice and administrative discharges. It amends article 37 of the Uniform Code of Military Justice[218] by extending the prohibition of acts producing command influence to include certain types of conduct which might affect the efforts of counsel or the fairness of the triers of fact.[219] The pre-trial lectures for court members, heretofore authorized by the *Manual for Courts-Martial*,[220] would be forbidden. For the first time the statutory prohibition of command influence would apply to the exercise of such influence on administrative boards—including discharge and separation boards and those other boards whose proceedings relate to demotion or reduction in grade, "or to any matter materially affecting the status or rights of

[214] S. 747, 89th Cong., 1st Sess. 2 (1965). The initial appointments would be for staggered terms so that the terms of office would not all expire simultaneously. *Ibid.*

[215] In the field of defense procurement, the handling of contract appeals has been unified by creation of an Armed Services Board of Contract Appeals. Perhaps this constitutes a precedent for S. 747. Senator Ervin has not introduced any legislation to consolidate or unify the discharge review boards established under 10 U.S.C. § 1553 (1964) in each military department. Probably he considers that there is more justification for maintaining the separation of these boards, whose members are uniformed military personnel, than for maintaining the separation of the correction boards, whose members are all civilians.

[216] See, *e.g.*, Oleson v. United States, Civil No. 376-64, Ct. Cl., July 16, 1965; Hertzog v. United States, 167 Ct. Cl. 377 (1964).

[217] This bill would reconstitute the "boards of review" established under Uniform Code of Military Justice art. 66, 10 U.S.C. § 866 (1964), as "courts of military review," which would then each have a civilian chairman. S. 748, 89th Cong., 1st Sess. 1-3 (1965). This bill has been severely criticized by the Armed Services on the ground, *inter alia*, that it is a gratuitous insult to military lawyers and would deprive these lawyers of desirable assignments.

[218] 10 U.S.C. § 837 (1964).

[219] For example, it proscribes the use of effectiveness reports as a lever for exerting command influence on defense counsel. S. 749, 89th Cong., 1st Sess. 3 (1965).

[220] MANUAL FOR COURTS-MARTIAL ¶ 38. This provision was upheld by a two-to-one vote in the Court of Military Appeals in United States v. Danzine, 12 U.S.C.M.A. 350, 30 C.M.R. 350 (1961).

any member of the armed forces."[221] The impact of extending the statutory prohibition against command influence to include administrative proceedings is somewhat diminished by the fact that the Court of Claims has already indicated in *Cole v. United States*[222] that, even absent any statutory prohibition, pre-trial lectures to board members and similar exercises of command influence threaten the serviceman respondent's constitutional right to due process.

Under S. 750 legally-qualified counsel, within the meaning of article 27 (b) of the Uniform Code,[223] must be provided an accused as a prerequisite for the adjudging of a bad conduct discharge by a special court-martial. Similarly, such counsel must be afforded to any member of the Armed Forces whom it is proposed to separate administratively from the service under conditions other than honorable; and a board must be convened where the serviceman can present evidence in his own behalf. Although the bill does not use the term "fair and impartial hearing," or even the word "hearing," the requirement that the serviceman be "afforded an opportunity to appear and present evidence in his own behalf before a board convened by appropriate authority"[224] might well be considered as legally equivalent to the requirement of a "fair and impartial hearing." In that event, it would be possible to apply the reasoning of Judge Holtzoff in *Gamage v. Zuckert*,[225] and to conclude that, by reason of the statutory requirement—whether or not it is constitutionally necessary—a respondent must be provided the opportunity to confront and cross-examine those whose derogatory statements or affidavits will be considered against him by the board.

The Department of Defense Directive issued on December 20, 1965, requires that a serviceman being considered for discharge under conditions other than honorable be "afforded the right to present his case before an administrative discharge board" with the advice and assistance of legally-qualified counsel.[226] The directive allows an escape from this requirement, however, where it can properly be certified that legally-qualified counsel is not available;[227]

[221] S. 749, 89th Cong., 1st Sess. 2 (1965).
[222] Civil No. 112-63, Ct. Cl., June 11, 1965.
[223] 10 U.S.C. § 827 (b) (1964).
[224] S. 750, 89th Cong., 1st Sess., § 2 (a), at 2 (1965).
[225] Civil No. 1124-64, D.D.C., Nov. 9, 1965.
[226] 1965 Dep't of Defense Directive paras. IV. (K.), V. (A.)2.
[227] *Id.* para. IV. (K.).

but S. 750 has no such exception to the requirement of an attorney.[228]

The serviceman's "right to present his case before an administrative discharge board" is probably susceptible of the same interpretation as the requirement of a "fair and impartial hearing" which was construed in *Gamage v. Zuckert.* The directive provides the protections of legally-qualified counsel and a hearing to a serviceman with "eight or more years of continuous active military service" who is being considered for a general or honorable discharge by reason of unsuitability.[229] On the other hand, S. 750 would apply only to proceedings that might lead to an undesirable discharge and would not protect the serviceman who is being considered for a general or honorable discharge, irrespective of his prior military service. Of course, another most important distinction between the directive and the statute—a distinction adverted to by some of the witnesses at the January 1966 Senate hearings—is that a directive can be amended or changed much more readily than a statute.

S. 751 and S. 752 concern only military justice, rather than administrative discharges.[230] Conversely, S. 753 involves only military administrative action and proposes an amendment of article 67 of the Uniform Code of Military Justice[231] which would empower

[228] There is an exception to the operation of this bill "in time of war if the Secretary concerned suspends the operation of such subsection." S. 750, 89th Cong., 1st Sess., § 2(a), at 2-3 (1965). Under the Uniform Code certain results hinge on the existence or nonexistence of "time of war"; and questions have arisen as to whether "time of war" requires a formal declaration of war or might be satisfied by a "police action" or other large scale conflict. See EVERETT, MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES 25, 29-30, 53, 173, 186 (1956). At the January 1966 hearings the Judge Advocate General of the Navy indicated that, if "time of war" were to be used as the basis of any exception, it might be wise to specify what is meant by the term. There were other suggestions to the effect that the exception should apply not only to time of war but also to periods of properly-declared national emergency; and some comments were heard that no exception should exist, even in wartime.

[229] 1965 Dep't of Defense Directive paras. VIII. (G.)2., (D.)1.

[230] S. 751, 89th Cong., 1st Sess. 1 (1965), would extend from one year to two years the period of time for submitting a petition for new trial; and it would also extend the category of cases in which such a petition would be available. S. 752, 89th Cong., 1st Sess. § 2, at 2 (1965), among other things, authorizes a court-martial to be composed of a single qualified law officer if the accused consents thereto. The efficiencies that would result from this bill and several others pertaining to courts-martial would make it much less onerous to resort to criminal proceedings in the military. This, in turn, would relieve some of the pressure to use administrative discharge proceedings in lieu of courts-martial.

[231] 10 U.S.C. § 867 (1964).

the Court of Military Appeals to review matters of law involved in cases that have been considered by either the discharge review boards[232] or the correction boards.[233] Thus, just as the Court of Military Appeals now rules on matters of law presented by courts-martial which are reviewed by the boards of review, it would be granted authority by S. 753 to review questions of law presented in the cases which have reached the discharge review boards or the correction boards.

The concept of judicial review in such cases is no longer a novel one; the earlier discussion of judicial remedies for administrative discharge action[234] should have made clear that review is already available through the Court of Claims or the federal district courts. Thus, the question arises whether the Court of Military Appeals should either be added to, or substituted for, the civil tribunals which already can accomplish this judicial review. S. 753 proposes that the Court of Military Appeals "shall have exclusive jurisdiction with respect to the review of cases brought before"[235] a discharge review board or a correction board. In light of exhaustion requirements, this provision would substantially curtail the opportunity of plaintiffs to bring suit in other courts—even suits seeking injunctions against proposed discharges. During the 1966 hearings criticisms were voiced that any such exclusive jurisdiction requirement, centralizing review in the Court of Military Appeals, would run counter to the policy embodied in the recent statutes which enable a plaintiff to sue government officials in the federal court district where he resides.[236] Objections were also expressed that the Court of Military Appeals already has a sufficient workload with military justice matters, and that those provisions of S. 753 which contemplate making appellate defense counsel available to the serviceman[237] would create a heavy, new workload for both the Armed Services and the Court of Military Appeals. Of course, to the extent that military authorities are being caused by current judicial decisions to turn from administrative discharge action to trials by court-martial, separations of military personnel for misconduct are already being

[232] These boards are established under 10 U.S.C. § 1553 (1964).

[233] These boards are established under 10 U.S.C. § 1552 (1964).

[234] See part II of this article *supra*.

[235] S. 753, 89th Cong., 1st Sess. 4 (1965).

[236] 28 U.S.C. §§ 1361, 1391 (e); see text accompanying notes 138-42 *supra*.

[237] Appellate defense counsel is already provided for in military justice matters by Uniform Code of Military Justice art. 70, 10 U.S.C. § 870 (1964).

disposed of in a manner which will permit their review by the court.

No separation of military personnel would be allowed under S. 754 unless the serviceman to be separated had "been accorded a hearing . . . before a board of officers convened for the specific purpose of determining whether such person should be separated or discharged under such conditions,"[238] and "the board, on the basis of the testimony and evidence presented at such hearing has recommended that such person be so separated or discharged."[239] The term "hearing" would seem to include the concept of a "fair and impartial hearing"; and thus it would authorize the interpretation used by Judge Holtzoff in *Gamage v. Zuckert.*

The prohibition of an undesirable discharge unless the discharge board has so recommended corresponds to a limitation on undesirable discharges contained in the new Department of Defense Directive.[240] Since S. 753 provides that the board's recommendation must be "on the basis of the testimony and evidence presented at such hearing,"[241] a question might be raised as to whether the wording of this bill would forbid the present procedure for show-cause hearings in cases where such hearings might result in an undesirable discharge. Under the present procedure the burden of producing evidence, and perhaps also the burden of persuasion, is placed on the respondent by reason of information which has already been considered by military authorities prior to the hearing. This information may lead to an undesirable discharge unless the respondent meets his burden; and so to some extent the result of the hearing and the board's recommendation hinge on evidence which has not been presented at the hearing.

Utilization of a law officer—a person competent to act as the law officer of a general court-martial[242]—would also be required by S. 754 for any board which might recommend a discharge under other than honorable conditions. In presenting this bill, Senator Ervin undoubtedly contemplated that an administrative discharge board would be much more able to protect the rights of the respondent serviceman if it were presided over by an experienced lawyer. Moreover, since S. 754 also requires that the respondent

[238] S. 754, 89th Cong., 1st Sess. 1-2 (1965).
[239] S. 754, 89th Cong., 1st Sess. 2 (1965).
[240] See 1965 Dep't of Defense Directive para. V.(A.)2.
[241] S. 754, 89th Cong., 1st Sess. 2 (1965).
[242] Uniform Code of Military Justice art. 26, 10 U.S.C. § 826 (1964).

be furnished with legally-qualified counsel, it seems that this right to counsel would mean far more if the hearings were presided over by a "judge." Of course, the presence of the "judge" would not necessarily require that an administrative discharge proceeding be conducted under the same rules of evidence applied in a court-martial.

The Armed Services have not favored the enactment of S. 754; undoubtedly they fear that the presence of a law officer or "judge" might result in the excessive application of technical legal rules and that, therefore, it would be all the more difficult to use the administrative discharge quickly and effectively. However, in view of recent judicial decisions which have increased the vulnerability of administrative discharge action, there is a substantial risk that legal error will creep in and invalidate the administrative discharge in any proceeding where there is no law officer to preside. In short, the more technical rules that are rapidly emerging with respect to administrative discharges may ultimately make it necessary that an attorney preside over the proceedings and apply those rules properly.[243]

If a law officer is to preside over military administrative discharge proceedings—at least, in cases where a recommendation of an undesirable discharge is possible—there will be a need to assure his independence and technical proficiency. Just as such needs gave rise to the field judiciary system used by the Army and Navy in trials by general court-martial, and for which statutory sanction has now been proposed by Senator Ervin,[244] some type of field judiciary may also be needed for administrative discharge boards. In that event, the logical answer would be to consolidate the field judiciary in such a way that a "military judge" who was part of this judiciary might preside over either a court-martial or an administrative discharge hearing.

Under S. 755 no member of a board of review established under article 66 of the Uniform Code[245] to review trials by court-martial would be allowed to prepare an effectiveness report with respect to any other member. This practice, which at one time existed in the Army[246] and still existed in the Air Force at the time of the

[243] See 1963 SUMMARY—REPORT 8.

[244] S. 745, 89th Cong., 1st Sess. (1965); see text accompanying notes 209-11 *supra*.

[245] 10 U.S.C. § 866 (1964).

[246] See 1963 SUMMARY—REPORT 21. In the Army this practice was discontinued on

January 1966 Senate hearings, allows the chairman of a board to affect materially the military career of other members, and thus presents some threat to the independence of those other members. The prohibition contained in S. 755 applies only to one kind of board: one created pursuant to article 66 of the Uniform Code.[247] However, the same principle might appropriately be applied by statute to other boards as well,[248] including any boards which consider or review administrative discharge action.

Because of the stigma and other serious consequences involved in a discharge under other than honorable conditions, Senator Ervin has proposed that double jeopardy concepts be extended by statute to bar certain administrative action. Thus, S. 756 would amend article 44 of the Uniform Code[249] to preclude an undesirable discharge based in whole or in part on alleged misconduct for which the prospective respondent has previously been tried and acquitted by court-martial. However, the proposed legislation would not limit use of the alleged misconduct, even after an acquittal, as the basis for separation action under honorable conditions—that is, an honorable or general discharge. Moreover, under S. 756 acquittal in a civil court, whether federal, state, or foreign, would not preclude basing an undesirable discharge on the same alleged offense of which the respondent had been acquitted.

At one time a commander who was displeased with the findings and recommendations of an administrative discharge board which he had convened was free to refer the matter to a second board; that board might then return new findings and recommendations that were far less favorable to the respondent, even if the evidence before the two boards were substantially the same. S. 756 would prohibit this practice, but apparently only in circumstances where the proposed discharge is to be under conditions other than honorable. Thus, under the wording of the bill, a second discharge board might be free to recommend a general discharge even though the first board had recommended retention or an honorable discharge. The

March 21, 1962—soon after it had been extensively criticized during the 1962 Senate hearings.

[247] 10 U.S.C. § 866 (1964).

[248] With respect to the boards of review created under Uniform Code of Military Justice art. 66, 10 U.S.C. § 866 (1964), the argument might be made that the rating practice has deprived the accused of an independent review by each member of the board—the type of review contemplated by Congress in establishing these boards. *Cf.* United States v. Deain, 5 U.S.C.M.A. 44, 17 C.M.R. 44 (1954).

[249] 10 U.S.C. § 844 (1964).

new Department of Defense Directive in this connection seems to go further than the proposed legislation;[250] it allows referral of the case to a new board only if the discharge authority "finds legal prejudice to the substantial rights of the respondent."[251] Moreover, the new board's proceedings cannot result in discharge action less favorable to the respondent than that which was recommended by the previous board.[252]

Simplification of court-martial procedure is the goal of S. 757, which does not deal directly with administrative discharges. However, this simplification will make court-martial action a more attractive remedy for misconduct.

S. 758, to which the Armed Services seem strongly opposed, would provide a right to trial by court-martial for a member of the Armed Forces whom it is proposed to separate "under conditions other than honorable on the grounds of alleged misconduct."[253] This right to trial by court-martial clearly is not recognized in military law at the present time; and military authorities contend that creating this right would undercut their needed authority to separate an unsuitable or unfit serviceman expeditiously.

There are several answers to these objections. Recent court decisions indicate that an administrative discharge may not always be so expeditious a method for separating a serviceman over his determined opposition, if he is directed by a skillful attorney. And the separation may prove illegal a few years later when the former serviceman recovers a substantial judgment for back pay in the Court of Claims. Most importantly, under the present law the

[250] See 1965 Dep't of Defense Directive para. IX. (D.)7.

[251] *Ibid.*

[252] *Ibid.*

[253] S. 758, 89th Cong., 1st Sess. 1 (1965). The bill does not apply to misconduct for which the respondent has been convicted in a state or federal court of competent jurisdiction. Apparently, however, the right to elect trial by court-martial *would* exist with respect to misconduct for which a serviceman had been convicted in a foreign court—although, by his request for trial by court-martial, the serviceman would be deemed to have waived any defense or plea of double jeopardy that the foreign trial might otherwise make available, pursuant to treaty guarantees like those in the NATO Status of Forces Agreement, June 19, 1951, art. VII, para. 8, [1953] 2 U.S.T. & O.I.A. 1792, T.I.A.S. No. 2846. See S. 758, 89th Cong., 1st Sess. 3 (1965).

This statutory right under S. 758 to demand trial with respect to the misconduct for which he has been convicted in a foreign court would conflict in part with 1965 Dep't of Defense Directive para. VII. (J.)1. That directive authorizes an undesirable discharge by reason of a foreign court conviction of an offense for which the maximum penalty under the Uniform Code would be confinement in excess of one year.

A right to elect trial by court-martial appears in various forms in Uniform Code of Military Justice arts. 4, 15, 20, 10 U.S.C. §§ 804, 815, 820 (1964).

serviceman may be deprived of valuable procedural protections because military authorities have decided to discharge him administratively, rather than by means of court-martial action; and this deprivation is a high price to pay for other supposed gains.

A choice would exist for military authorities under the provisions of S. 758: if they wish to discharge a serviceman under other than honorable conditions and he has requested a court-martial, he cannot be proceeded against further administratively for his alleged misconduct. If, however, the primary concern is simply to get rid of him as soon as possible, the military still have the means of doing so; there is apparently nothing in the bill that would give a serviceman the right to demand a court-martial if it were proposed to discharge him, because of his misconduct, with a discharge under honorable conditions—either honorable or general.

In some instances a respondent serviceman, anticipating that the Government would have difficulty in proving its case before a court-martial because of lack of a corpus delicti, unavailability of key witnesses, or the like, might elect to request court-martial in accord with S. 758. And he might win on this gamble—with the result that a guilty person would escape almost unscathed. The gamble, however, is not always attractive. The administrative discharge, even when under other than honorable conditions, does not allow the imposition of any sentence to confinement. On the other hand, the accused who requests trial by court-martial for his alleged misconduct may ultimately be convicted and serve an extensive term of confinement.

The military also argue that S. 758 would deprive them of the power to get rid of the person who is unfit because he participates in many petty violations of law and order; this type of person now is frequently discharged administratively. However, in light of the "permissible additional punishments" authorized by the *Manual for Courts-Martial,* courts-martial are also presently empowered to deal with such a person by punishing him as an habitual offender;[254] thus, a commander would not be remediless.

Abolition of the summary court-martial is provided by S. 759. While this bill concerns military justice, it has some relevance to administrative discharges in that several convictions by summary courts-martial provide excellent documentation of a pattern of mis-

[254] See note 26 *supra.*

conduct—which, in turn, demonstrates unfitness. However, the very ease with which convictions by summary court-martial can be pyramided into more serious consequences furnish one argument for the abolition of that type of military tribunal.

Subpoena power for administrative discharge boards, as well as for the discharge review boards and the correction boards, would be authorized by S. 760.[255] In this way a solution would be provided for the difficulty adverted to in *Gamage v. Zuckert*[256]—namely, that the respondent may have been granted the right to confront and cross-examine adverse witnesses whose statements have been used against him, but the board has no power to compel the witnesses' attendance. The Department of Defense has indicated that it may not oppose extension of the subpoena power to administrative discharge boards,[257] subject to some limitation on unreasonable requests for witnesses; but it does oppose extension of the subpoena power to the discharge review boards or the correction boards.

CONCLUSION

After the Uniform Code of Military Justice took effect on May 31, 1951, a pronounced trend developed to substitute administrative discharge action for trials by court-martial in instances where a major objective was to eliminate a troublemaker from the service. The administrative discharge was speedy, and apparently it was not subject to judicial review. Moreover, an undesirable discharge given administratively could subject the recipient to many of the same consequences that would accompany a punitive discharge.

The use of administrative action to bypass the safeguards of the Uniform Code disturbed both Congress and the courts. Perhaps largely as a result of congressional studies and judicial decisions, the Armed Services have changed materially the procedures governing administrative discharges. Thus, the issuance of an administrative discharge is becoming less and less the line of least resistance for military authorities to follow; and, as a result, the

[255] S. 760, 89th Cong., Ist Sess. 2 (1965). Subpoena power would also be authorized for the pre-trial investigations required by Uniform Code of Military Justice art. 32, 10 U.S.C. § 832 (1964)—that is, cases where a general court-martial may take place.

[256] Civil No. 1124-64, D.D.C., Nov. 9, 1965.

[257] However, the Department apparently considers that this power should be extended by some means other than amendment of article 46 of the Uniform Code, 10 U.S.C. § 846 (1964). Article 46, it has been suggested, should be limited to military justice matters.

pendulum is swinging back toward the utilization of courts-martial to deal with misconduct.

Even though administrative discharge action is now much less a threat to the rights of service personnel than it was only a few years ago, there is still a need for legislation to deal more specifically with some of the uncharted areas and to provide rules that cannot be changed at the will of the military. Senator Ervin's proposals and the recent Senate hearings thereon should point the way to the enactment of this needed legislation.